THE SECULAR STATE PREMISE, AND THE KADHI COURT DEBATE DURING KENYA'S CONSTITUTIONAL REVIEW MOMENT

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DECLARATION

Declaration by the Candidate

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DEDICATION

This work is dedicated to the late Peter Okeyo Ojwang' whose vision continues to guide me, Mary Anyango and John Ahaya the parents I adore most, Benedict and Jaboda with whom friendship has come to surpass blood relations.

Special dedications to Georgine a caring wife, and the ladies of my life, Clene Achieng, Elsie Adhiambo, and Natalie Anyango. Special one to Rahman Ochieng Ochieng.

My last dedication is to all those who deserve to be mentioned, and those who appreciate that to do good is to know God.

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ABSTRACT

The entrenchment of the *Kadhi* court in the 2010 Constitution, during the constitutional moment in Kenya resulted into religious tensions to a level rarely witnessed before in the politics of the country. The purpose of this study was to find out how the secular state premise had been seized upon to argue against the entrenchment of the *Kadhi* court in the 2010 Constitution of Kenya. The problem of the study was to establish the extent to which the argument against the entrenchment of *Kadhi* court in the constitution on the secular state premise conformed to the core concern of the secular state of Kenya as it grappled with religious pluralism among its diverse population. The problem entailed an investigation of the phenomena of state secularism in the context of Kenya, as well as examining the secular state premise as it was used to oppose the entrenchment of the *Kadhi* court in the 2010 Constitution. The study maintained in this respect that the secular state as a phenomenon applied differently in different national contexts, and that to oppose the entrenchment of *Kadhi* court in the 2010 Constitution of Kenya on grounds of strict separation of religion and state, as did a section of the Church, did not reflect the nation of Kenya. The study was anchored on the socio-cultural evolution, critical and conflict theories as they related to the public policy of state on religion in the modern nation state. The study recognized in this respect that the secular state premise could be used to enhance political control by majority Christians over the minority Muslims in Kenya. The study, while employing a qualitative compressed ethnographic design, carried out critical analysis of data from the defunct Constitutional Review Commission of Kenya (CRCK) on the issue of *Kadhi* court. This was followed by interviews and questionnaires administered to the key informants from the Christian and Muslim communities in Kenya. It was clear in the study that the understanding of secular state phenomenon in Kenya did not necessarily exclude religion, but instead constituted a rather complex mediation between religion and the state. The study further established that the entrenchment of the *kadhi* court in the 2010 Constitution, much as it introduced religious import in the Constitution, left the secular premise intact.

DEFINITION OF TERMS

Kadhi court

Is a Muslim court or judicial institution applying Islamic law, and with a jurisdiction that varies from one state to another.

Independence Constitution of Kenya

This document came into force on 12th December 1963 as a product of negotiations between Kenyan political parties and the British government.

2010 Constitution of Kenya

A new constitutional dispensation that came into force on 27th May 2010 following the promulgation of the Constitutional draft, passed at a referendum held on 4th May 2010.

Constitutional review moment

This is employed in this study as a critical juncture moment in history characterized by particular forms of popular mobilization involving innovations with status equal to formal constitutional amendments, during which time, the general public is deeply engaged on deliberations about public interest with relatively impartial view as opposed to periods of ordinary politics.

Secular State Premise

This is used in this study to denote a position of argument against the entrenchment of the *Kadhi* court in the 2010 Constitution of Kenya on grounds that Kenya as a country separated religion from state.

Secularism

This is used in this study to denote a phenomenon when a religiously centered world approach is slowly replaced with a more "this worldly" approach and meanings are increasingly sought from within rather than beyond.

Passive Secularism

This is a type of state secularism that tolerates public visibility of religion in state.

Assertive Secularism

This is a type of state secularism that does not tolerate public visibility of religion in state.

Constitutionalism

This is used in terms of a legal regime that underscores a doctrine that attempts as much as possible to control state power leaving very little room at the whim of holders of Political power.

Modern Nation State

This is used in this study as a contemporary model of nation building that ignores and even combats expressions of ethnic identity with a strong assimilationist approach that emphasizes national unity of the state.

Kenyan Nation

This is used in this study to view Kenya people from the constitutional model of nation building adopted at independence. The expression of Kenya as a nation ignores and even combats expressions of ethnic identity with a strong assimilationist approach that emphasize national unity of all ethnic groups in Kenya.

Nations of Kenya

This is used in reference to the various ethnic groups in the tribal form that Constitute Kenya as a nation.

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CHAPTER ONE

Introduction

This chapter constitutes an introduction to the examination of the entrenchment of the *Kadhi* court in the Kenyan constitution as a reflection of public visibility of religion in an otherwise secular state. Specifically the chapter introduces the study, states the problem of the study, draws the scope, informs on the theoretical framework adopted by the study and the methodology employed.

1.0 Introductory Background to the study

The relationship between religion and society during the classical, medieval, and modern periods is a subject that has received much attention from scholars. Thomas Hobbes writing about the mid-seventeenth century conceived this relationship in form of Leviathan state and the mortal god; a situation when the state plays God who is within, (Malan, 2012, 1). Earlier, Saint Augustine of *De Civitatis Dei,* or the City of God, writing at the beginning of the fifth century, had signaled a transition from the classical world to the impending religious-centered world of the middle ages; a world where the God above and beyond controlled the world below,(Figgis, 1963, 1). Jean Jacques Rousseau writing before the French Revolution (Rousseau, 1973), Emille Durkheim and his model of Religion and Society (see Pickering, 1975), and Robert Bellaa's revival of Rousseau and Durkheim's ideas in the second half of the 20th century (Bellaa, 1950), all can be seen as responding to this problematic interaction between religion and society

As a representative of this group, Emile Durkheim concluded that religion should

be understood as a social phenomenon, maintaining that "when it is understood that above the individual there is the society, and that this is not a nominal being created by reason but a system of active forces, a new manner of explaining men become possible" (Maquarrie, 1963, 155). Durkheim argued that religion serves the need of the society, and the object of its cult, concealed under the figures of its particular mythology, is the society itself. Therefore, rather than think of the distinction of particular religions and society, he sustained that religion and society (also read as state) are indistinguishable, and therefore cannot be separated; God and society therefore are one and the same, (Maquarrie, 1963, 155).

Modern times, however, have proved to be exacting to the religious phenomenon. This situation can be traced to the late Middle Ages due to a concurrent process of individualization, secularization, and state creation. Individualization of human societies witnessed the breakdown of traditions that for a long time had held societies together. The development of the nation state and the accompanying statist conservative logic are in fact the products of secularization which rejected spiritual subordination of the Church, and spearheaded instead, a way of life free from religious regulation and Church control, (Bockenforde, 1981, 26). The 17th Century efforts to emancipate science further conflicted with religious authorities. The conflict saw the world witness modern era's first ever conception that the society could exist without religious tutelage. Karl Marx and Max Weber pioneered works that provided the first assumptions with regard to the literal diminishing role of religion in modern societies (see Thompson, 1990, 79). Marx theorized about the demystification of social relations and regarded it as the precondition for the ultimate emancipation from exploitative class relations supported by the veil of

religion (Thompson, 1990, 77). Weber theorized instead, of the disenchantment of the modern world, in which some of the traditional and distinctive values of Western civilization were submerged beneath the increasing rationalization and bureaucratization of social life. Both writers are reporting about the genesis of secular phenomenon of the modern society; a process in which science, politics, society, economics, justice, art, and morality are understood on their own terms and follow their own laws rather than religious determinism (Thompson, 1990, 79).

Bryan Wilson cautions that secular phenomenon only applies when the relationship between religion and society is viewed from the substantive point of view, which includes beliefs, orientations, attitudes, activities, institutions, and structures pertaining to the supernatural. Otherwise when examined functionally (in terms of certain functions regarded as indispensable for continuance of society or for its cohesion), it becomes difficult to speak of secularization as a process when human beings everywhere are just faced by themselves, (Wilson, 1987).

As secular process invades the political arena, it is captured as the separation of religion and government (often termed as separation of church and state, or state secularism). Ahmet Kuru in a study of state secularism in three countries of United States, France, and Turkey has demonstrated that the phenomenon of state secularism is not uniform. He concludes that the three countries are deeply concerned with religion in the public policy thereby engaging it on many fronts. Kuru observes that American state policy toward religion is inclusionary and exhibits passive secularism, while that of France and Turkey is exclusionary toward public visibility of religion in the state, exhibiting assertive secularism (Kuru, 2007, 570). Kuru argues that the modern state

policy differences towards religion are the result of ideological struggles at critical junctures in a country's history, (Kuru, 2007, 570-71). In general, the dominance of passive secularism is based on overlapping consensus between secular and religious group actors during the critical juncture in the country's history. In opposite, that of assertive secularism is deemed as a product of ideological conflict between the two groups during the critical juncture in the country's history.

There is a conception that the secular phenomenon may have Biblical support in Jesus' statement about Caesar and God (see Mark 12:17, see also Wikipedia.org, 2010). Under implication here is the presence of two worlds; "this world or secular world" of change, and "the religious or spiritual world," which is timeless, changeless and superior, (Cox, 1965, 19). This raises other questions: Does it not make it easy for Christianity to embrace secular state phenomenon in comparison to the other religious traditions? Is state secularism not a Christian phenomenon? Secularism is a complex phenomenon, and Herbert Fingerrettes captures this complexity in his book, *Confucius: The Secular as Sacred* (Wikipedia.org, 2010). It is possible that whether something is regarded as "secular" or "sacred" is ultimately a definitional problem considering that there is no universally accepted boundary where religion ends or begins. Abdulahi Ahmed An-Naim has approached secularism of state from a perspective that does not only emphasize separation of religion and state, but considers other aspects that reflects historical, political, social, and economic landscapes of a particular nation (An Naim, 1990). The foregoing views by Kuru citing cases of France, United States, and Turkey, and the expanded approach advanced by An-Naim underscore secularism of states as a relative term that potentially differs from one nation to another depending on their peculiar

ideological and historical backgrounds.

The nature of a secular state was an issue of political concern during Kenya's constitutional review moment. The entrenchment of the *Kadhi* court in the 2010 Constitution raised religious tensions to a level rarely seen before in the politics of the country. A section of the Church argued that Kenya as a secular state should not entrench the *Kadhi* court in the Constitution as this compromised the religious neutrality of the state. This appeal was captured by Abdulkader Tayob who argued:

> The Kenya Church demanded that all mention of *qadi's* courts be completely removed from the Constitution, including the provision for women membership on the boards appointing *qadis*. Such provisions, it felt, meant that one particular religion was being privileged in the Constitution, which violated the principle of the separation of religion and state (Tayob, 2003, 40).

Muslims in Kenya responded to this argument by pointing out the anomaly between the Church's demand for separation of religion and state, and its suggestion for a religious justification for the state. Many Muslims viewed the Kenya Church's objection to any constitutional provision for *Kadhi* court as biased in terms of the existing close relationship between the Kenyan state and the Christian Church (Tayob, 2003, 40).

Though it was clear that a section of the Kenyan church was against the entrenchment of the *Kadhi* court in the constitution, the Independence Constitution had accommodated the court as section 66(1) of the constitution stipulated that "there shall be a chief *Kadhi,* and such number, not being less than three, of other *Kadhis* as may be

prescribed by law under an act of parliament" (The National Council for Law, 2009). More so, the Independence Constitution safeguarded freedom of religion, (The National Council for Law, 2009), as well as protection of everyone including religious minority groups from discrimination (The National Council for Law, 2009). These safeguards could be traced to *the politiques;* a religious neutral political grouping that emerged out of the French religious wars (Malan, 2012, 65). The group conceived state-religion separation, religious freedoms, and other precautions from the perspective of state interest, guaranteeing minority protection and stability of the state (Allen, 1960, 296).

This introductory background submits that secular state phenomenon does not always necessarily imply the literal separation of state and religion even though that is often its statement. It is in this spirit that Muslims in Kenya felt that the 2010 Constitution of Kenya, with its express secular declaration, should improve and continue to accommodate the institution of the *Kadhi* court.

1.1 Statement of the Problem

The general problem of this study was to establish the implication of secular state phenomenon in the context of the Kenyan nation. In particular, the study was concerned with the opposition to the entrenchment of *Kadhi* court in the country's constitution by a section of churches on the grounds that Kenya had chosen the secular path. The opposition raised the following questions, which the study addressed:

(a) What is the understanding of the secular state concept in the specific context of Kenya as a nation?

(b) Did the opposition to the entrenchment of the *Kadhi* court in the 2010 Constitution of Kenya on the grounds that Kenya was a secular state, reflect Kenya as

a nation?

In its endeavor to analyze the debate surrounding the entrenchment of *Kadhi* court in the 2010 Constitution of Kenya, the study addressed other themes such as secularism, and secular state, leadership in Islam, jurisdiction of shariah in the Kenyan legal system, and Muslims as an ethnic diversity in the Kenyan constitutionalism.

1.2 Literature Review

The literature review in this study captured areas such as secularism, and secular state phenomenon, State and Religion Relations in Islam, Kadhi Court and the Constitution, and the Muslim-non-Muslim relations in Kenya.

1.2.1 Secularism, and Secular State

Jean Piere Lonchamp in *Science and Belief* has treated the interaction between religion and society in details (Lonchamp, 1903). Lonchamp noted that state and religion was previously one and the same thing until the 17th century A.D. when efforts to emancipate science entailed conflict with religious authorities. This was particularly due to the Church's adopted defensive attitude toward science in response to the philosophy of enlightenment. Arguably, this marked the first ever conception that the state could exist without religious tutelage, hence inaugurating secular society as a conceptual reality.

Karl Marx observed that the demystifying character of modern era had stripped social relations of "that train of ancient and vulnerable prejudices and opinions which shrouded them in the past. This process according to Marx had placed humanity in a

threshold of new era ushered in by an enlightened transformation of society based on shared knowledge of demystified social relations hence the phenomenon of secularism (Thompson, 1990, 77). Max Weber also looked at the phenomena of secularism advancing one of the most elaborate theoretical attempts about the genesis of secular process (Marshalls, 1982).He postulated that Protestantism by reducing the role of priests in people's relationship with God,9 did in fact foster religion as a matter of personal concern and choice. Protestantism in this way reduced the role of priests in the peoples' religious life and enhanced religious individualism. On the other hand, expansion of the notion of religious work to include secular occupations, and spending the returns in ways that were not sinful increased material prosperity. The material prosperity so accrued made it more difficult to maintain asceticism, giving way to simple worldliness. Weber referred to the entire process as disenchantment of the modern world; a phenomenon that sets in secular process (Marshalls, 1982).

Steve Bruce acknowledged that secularization was a phenomenon operating in modern societies, thereby alleging that religion was declining due to modern social changes (Bruce, 1990). Consequently, he viewed the trend of secularization as one of cycles of increasing and decreasing religiosity

Heinz Zahrnt, in *The Question of God-Protestant Theology in the 20th Century*, expressed alarm at the process of secularism, noting that what was evident was not the disintegration of a particular religion accompanied as in the past by transition from an old religion to a new one, but the destruction of the essence of religion (Zahrnt, 1966). Providing a sense of optimism, Zahrnt advised that propagation of religious ideas to be done in a way that makes sense to the modern man.

Rodney Stark and Bainbridge maintained a transitional view with regard to secular process. In their study, *The future of Religion: Secularization, Revival and Cult Formation,* they advanced a theory based on economics of religion (Stark and Bainbridge, 1985). In this theory, they argued that whereas membership in the established Churches fell, there was an increase in the popularity of new religions, indicating absence of decline in religious life of humankind. Secular process merely presented a shift in the fortunes of religions. In this shift, religions that had become very worldly were replaced with the less worldly ones. These authors concluded that though sources of religion were shifting constantly in modern societies, the amount of religion remained relatively constant. Furnishing history of religion as evidence, the authors have pointed out that this history was not just a history of religious decline, but a history of religious rebirths as well (Stark and Bainbridge, 1985).

Secularism is a complex phenomenon that cannot be evaluated effectively by mere membership to particular religious groups. This view informs Abdelwahab M. Elmessiri's position of secularism as a comprehensive world outlook that operates at all levels of reality. In an article, "Parables of Freedom and Necessity: The Rising Levels of Secularization as Manifested in Two Literary Works", he advances a view of secular phenomenon as the underlying, and overarching ingredient in the modern western civilization. As an ingredient, secularism operates on all levels of reality, where it shapes modern person's dreams, public life, and conduct (Elmessiri, 1996). As a worldview, secularism operates in terms of metaphysics of immanence and materialistic rationalism, where the center of the universe is immanent, and can be found in both humanity and nature, or in either. This worldview prioritizes the sake for humanity, and nature. In this

way modern secularism can be said to operate on a dualism of nature and humanity that some scholars have visualized as illusionary (Elmessiri, 1996).

The complex nature of the encroachment of secular phenomenon has defeated attempts to gauge it against tangible historical facts. Elmessiri has made an interesting attempt at gauging the characteristics of the current forms of secularism in a way that is closer to historical time and space by postulating what he has called 'paradigmatic sequence of secularization,' (Elmessiri, 1996,43).In this postulation, Elmessiri, rather than view a paradigm as a timeless mental construct, he has instead viewed it as a coherent structure complete only in potential. He maintains in this respect that secularism of modern times has been unfolding concretely in time through different historical phases. The most common view of secularism is that of separation of church and state, which confines secularism to the political and economic realms. Elmessiri upholds that the first social sector to be secularized was the economic activity that became exclusively economic, deriving the criteria of validity from itself. The political sector followed suit as was contained in the theory of the state as an end in itself, and its separation from the church, and from all morals and human ideals. Of significance to this study is that in the theory of paradigmatic sequence of secularization, the two phenomena of secularism, and the secular state are eventually connected; a connection that is of immense significance to this study.

1.2.2 Commentaries on State and Religion Relations in Islam

Sayyid Abul A'la Maududi, in *Towards Understanding Islam*, stated that Islam lacked the dichotomy of state on the one side, and personal and private life on the other. In the early era of Muslim history activities of state were co-extensive with human life

thereby entailing what he termed as an Islamic state (Maududi, 1980, 13). This position is of relevance to this study as it points out that there are Muslims scholars who subscribe to the view that state secularity is an alien phenomenon to Islam.

Ali Abd al-Raziq (1888-1966) and Maududi's views are in conflict when al-Raziq maintains that Islam does not specify any government, and spirituality and politics are separable (al-Raziq, 1925). He cites Qur'anic and Hadith passages to support his position, holding that Prophet Muhammad did not start a kingdom in the political sense, but was bestowed with authority that was greater than earthly kingship. For Muhammad it was the message and not government, religion and not state, that held sway (al-Raziq, 1925). Clearly, this indicates separation of state and religion, and a pointer of Islam accommodating the separation of state and religion as demanded by the Kenyan Constitution.

Mohamed Khalaf-Allah (1916-1997) confirms Al-Raziq's position while employing a different approach. In the book *Quran and State*, Khalaf-Allah explores the historical relationship between the Qur'an and state among Muslim regimes (Khalaf-Allah, 1973, 55-59). The orthodox caliphate scores highly in this historical comparison as a moment when the Qur'an and state were particularly close. Ummayad dynasty on the other hand was characterized by rulers who did not rely on the Qur'an to guide their ruler-ship, where as Abbassid and later Fatimid dynasties are all characterized with an increasing dichotomy between Muslim government and the Qur'an. Khalaf-Allah concludes that contemporary Muslim societies are engaged in a balancing act between Islamic scholars' position on religion and state, and realities of modern societies.

Writing on Muslims and state in the contemporary world, John L. Esposito concurs with the conclusion of Khalaf-Allah. In Esposito's analysis, he establishes that modernity was present in institutions of Muslim societies, and the pact with modernity was considered dishonorable by the traditionalists, particularly, as it separated religion and state (Esposito, 1998, 158).

In an article "contemporary Islam: religion and Politics" Esposito postulated that the main theme in the Muslim world since the 1970s was resurgence. He maintained that this was expressed in language of authenticity, religio-cultural revival (*Tajdid*), reform (*Islah*), and renaissance. Esposito gave a review of nation building among some selected Muslim nations, and pointed out that this phenomenon was expressed in a pluriform, rather than monolithic Islam (Esposito, 1998, 158). The pluriform expression of Islam results into a continuum ranging from Islamic declared states on one side, and the secular Muslim states on the other, and in between exist varieties. The reforms sought after in the Muslim states ranged from gradual transformation of society on the one hand to revolution on the other. It is relevant to this study when Esposito analysed that the use of Islam in the politics of the contemporary world had taken a number of modes conditioned by local socio-political realities. The following question is tenable in our case; what are the trends in the contemporary global Islamic politics, and how are these exhibited in the demands for the entrenchment of *Kadhi* court in Kenya's constitution?

Hassan J. Ndzovu has looked at Muslims in the politics of Kenya. Ndzovu observed generally that separation of religion and state in a historical context of the Muslim society was not clearly defined as, "there are those who hold the view that religion and politics are integral while for other Muslims the two are separable" (Ndzovu,

2009, 49-51). This was an observation that also summarized the literature so far reviewed on religion and state among the Muslim societies. Ndzovu mainly dwelt on analysis of Muslims in the politics of Kenya. This analysis was from a wide historical perspective that mainly paid attention to national and local influence. Regarding separation of state and religion in Kenya, Ndzovu, cited that there was no evidence to show that the Church was specially favored. He appeared to refute the alleged closeness between the Christian Church and Kenyan state. It was difficult to reconcile this position by Ndzovu with the fact that the Independence Constitution of Kenya had its foundation in the Christian tradition. While Ndzovu emphasized national and local influences with respect to Muslim politics, this study in addition recognizes globalization phenomenon as a powerful reminder that external influences are just as critical in any analysis of current history including that of Muslims and factors affecting it.

1.2.3 Kadhi Court and the Constitution

Tarun Arora has examined the basis of the Constitution of India as a sovereign socialist secular democratic republic. In the article "Secularism under Constitutional Framework of India," the author argued that India charted the secular constitutional path so that it could uphold justice, liberty and equality in the face of its religiously plural society (Arora, 2009). Arora cited articles 25 and 26 of the Indian Constitution that provided the basis for individual and group rights to profess religion of choice. In the same article, there were sub-sections that provided the state with sweeping powers to interfere in religious matters. Irrespective of this interference, Arora was convinced that the Indian Constitution contained the necessary ideals required for it to fulfill the secular mandate. This writer, however, maintains that sometimes the provision of a uniform civil

code often expressed the aspirations of the dominant group at the expense of the views of the minority groups. In this respect Arora noted that the provision of a uniform civil code had endangered the existence of the minorities in India (Arora, 2009). The same concern informed this study, when secular state concept was applied uniformly and literally by a section of the Church to oppose the *Kadhi* court during the constitutional moment.

Abdul Kader Tayob has linked the emergence of religion in Public sphere to democratization in Africa, arguing that though religion often was a great benefactor of the democratic space, specific religious denominations rarely relate with each other democratically (Tayob, 2003, 40). Commenting on the debates about the *Kadhi* court entrenchment in the Constitution of Kenya, Tayob observed that religion and nationalism in Kenya are closely linked (Tayob, 2003, 40). He pointed out an irony during the review moment for the 2010 Constitution, asserting that the symbolism of the *Kadhi* court in the Constitution was objectionable by the dominant Christian majority on state secularism premise, yet the place of religion in the broader symbolism of the state was acceptable in the same Constitution.

Kuria Mwangi's "Application and Development of Shariah in Kenya: 1885 - 1990" has examined the organization, and operations of the *Kadhi* court in Kenya through history up to 1990 (Mwangi,1995). It was relevant to this study when no conflict between the *Kadhi* court and state secularity was cited in regard to the country's history. Therefore, my study relied on this history as it endeavored to examine the entrenchment of the *Kadhi* court in the Constitution during the constitutional review moment. Mohamed Bakari has reasons to hold that Muslims in Kenya have seldom been treated

fairly, citing political attempts made to manipulate and undermine the *Kadhi* court in the guise of introducing changes (Bakari, 1995).

John Chessworth in an article "Kadhis courts in Kenya; reactions and responses," has examined the historical settings of *Kadhi* courts in Kenya. Chessworth cites a report of the 14th century Morrocan traveler Ibin Batuta to assert that the Islamic legal system was already operating at the East African coast in the form of Shafii School of law long before the modern era. The British administration which took over the region following the Berlin conference of 1884, was intent on ensuring continuation of the Islamic legal system, while requiring religious freedom for all those other faiths living in the sultan territory (Chesworth, 2011). The British also set up Islamic courts in upcountry areas where there were significant number of Muslims (Anderson, 1970, 107). This included areas like Isiolo and Mumias (Trimingham, 1964, 158)

During the British colonial period, the Chief *Kadhi'*s office was the head of the Islamic judicial system and was based in Mombasa. Towards independence, The British and the Sultan of Zanzibar wished that the ten mile strip should be retained, as could be seen in the agreement signed by the Kenyan and the Zanzibari Prime Ministers on 5th October 1963 (Chesworth, 2011,5). The agreement included the text of two letters both which included a clause stating:

> The jurisdiction of the Chief *Kadhi* and of all other *Kadhis* will at all times be preserved and will extend to the determination of questions of Muslim law relating to personal status (for example, marriage, divorce, and inheritance) in proceedings in which all parties profess the Muslim religion, (Chesworth, 2011,5).

In this clause, Chessworth discerns a confirmation and basis of the presence of *Kadhi* courts in the post independence constitution of Kenya. In the article, Chessworth goes further and elaborates the changes that have taken place in the post-independence Constituition of Kenya with particular reference to the *Kadhi* courts. He then embarks on the public discourses on the *Kadhi* courts following the demand for the review of the Kenyan Constituition tracing the process to 1998. He notes that the presence of the *Kadhi* courts in the Constitution led to no adverse comments until the constitutional review of 2002, at which moment, he notes, the other proposals in the review taken together with events elsewhere raised awareness of *Kadhi* court. This work is informative to this study as it isolates the secular state premise as a ground used to oppose the *Kadhi* court during the "raised awareness" moment.

Mohammed Mraja in "Kadhis Court in Kenya: Current Debates on the Harmonized Draft Constitution of Kenya," has examined the core issues surrounding the debates on *Kadhi* courts including why the Committee of Experts (CoE) did not consider *Kadhi* court as contentious, and the arguments for and against the retrenchment of the courts in the Constitution. In a study relying more on newspaper reports as the primary source due to the recent nature of the area of study, Mraja summarizes the synthesis of the argument for and against the entrenchment of *Kadhi* court in the 2010 Constitution, (Mraja, 2011). This work, above many aspects, confirm the secular state premise as employed to retrench the *kadhi* court in the 2010 Constitution. This can be deduced from the citations from a section of the church stating that the constitution declares the separation of state and religion, and that, there shall be no state religion. Mraja equally

captures the justification for entrenchment of *Kadhi* court from some non-Muslims and Muslims thus:

> The notion that the country must separate state matters from religious ones in a secular frame has been unconvincing. The current Constitution and the harmonized draft have a national anthem which recognizes God as the originator of all creation. Moreover, Sunday, a Christian day of worship, not Friday is recognized by the state as a holiday. The separation of state and religion is an idealistic concept and practice has shown that many nations try to accommodate the religious needs, rights, and freedom of their citizens (Mraja, 2011, 36).

Mraja's summary clearly confirms that the secular state as a concept was conflictual, and understood differently by both proponents and opponents of the entrenchment of *Kadhi* court in the 2010 Constitution. This conflict of understanding with reference to *Kadhi* court is the main concern of this study.

Bailey Funderburk's article, "Between the Lines of Hegemony and Subordination: The Mombasa Kadhi's Court in Contemporary Kenya,"has reflected on the *Kadhi* court as a site of struggle and contestation, where Kenyan Muslims attempt to maintain a court that upholds *Sharia* law, while simultaneously participating as equal citizens in a pluralistic secular society that is often at odds with such attempts at upholding tradition (Funderburk, 2010). Funderburk maintains that Kenyan *Kadhi* court has a long standing relationship with the country's secular law, dating back to the arrival of the Imperial British East African Company in 1887. The architect of British East African indirect rule,

Arthur Hardinge established jurisdiction of *Kadhi* court in every district along the coast, confining Islamic law to only matters of personal status, consisting of marriage, divorce, and inheritance. Hardinge further created the position of a Chief Kadhi to be responsible for overseeing all *Kadhi* courts within British jurisdiction, and handling matters of appeals, and the secular positions as administrative magistrates that could claim jurisdiction in Muslim personal law. These changes have lasted within the *Kadhi* courts through the reign of colonialism and into post independent Kenya, with the same standards of jurisdiction being renewed and applied through the Constitutions of Kenya, including the 2010 Constitution of Kenya.

According to the study, the *Kadhi* court is officially given jurisdiction as seen fit by the Kenyan Parliament, and any matters decided in the courts can be appealed in the country's High Court, so that secular legal systems always rank supreme, at least in technical language. Due to the organizational structure of the *Kadhi* court in comparison to the Muslim population in the country, the *Kadhi* court is solely responsible for the decisions regarding a large population, yet the same court fails to have a strong system in place to temper the power wielded by the *Kadhi.* The *Kadhi*' court are further beset by a variety of problems that include critiques in gender, language, bureaucratic, transnational, cost, power structure, constitutional, and jurisdictional spheres. Consequently, those who use the court forum are working within a specific set of limitations. The weaknesses in *Kadhi* court system is clearly seen in the appellate system of the court that lacks in structural check on the *Kadhi's* power, because even if his decisions are publically regarded as mediocre or inadequate, the system is not structurally designed for an arena of dissent communication. In spite of these limitations, Funderburk maintains a differing

view of the *Kadhi* court as a financial burden to the country as was the claim by part of the opposition to the entrenchment of the *Kadhi* court in the 2010 Constitution. In Funderburk's judgment;

> The *Kadhis*' courts do the reverse; they actually privilege all Kenyan religious sects, because they eliminate 4.3 million people (Kenyan Muslims) from the already overstretched secular court system. The *Kadhis*' courts do not act as a financial burden because it has low overhead to be financed, and Muslim citizens of Kenya are certainly paying more in taxes than the minor costs of a *Kadhis*' court system with only 17 *Kadhis* for the entire country. Additionally, the court does not necessarily act as a privileged experience that those who are not practicing Muslims are robbed of; rather it is often a stressful experience that Muslims put themselves through in order to get legal decisions that keep their personal faith and values in mind (Funderburk, 2010).

Funderburk concludes with a strong argument on the contemporary global nature of the *Kadhi* court, when he asserts that the *Kadhis* courts are not just Kenyan, but rather has turned out to be a legal system that finds itself extending its power across the world. This is not just to neighboring communities, but even, to the family law decisions of some people in the western world who profess the Muslim faith and have issues where one person involved has ties to Kenya specifically with respect to the *Kadhi* court.

At this juncture an important question can be raised: whose interpretations of *Sharia* and Islam are being applied within the space of the courtroom? Clearly numerous

scholars have highlighted that the so called *Sharia*, or Islamic law, is a historic product of debates between Muslims across space and time. Within *Sharia* there is room for disagreement and critique, but its application in the courtroom can pave over these disagreements with a sweeping and particularistic interpretations that often serve to perpetuate a patriarchal and elite dominated system (Funderburk, 2010). This work by Funderburk sheds relevant light on operations of the *Kadhi* court phenomenon in Kenya, which is a relevant issue in this study.

That the *Kadhi* court debates were potentially divisive during the constitutional review came out in the report by the Kenyan chapter of the International Commission of Jurists (ICJ (K). In this report with a title, "The Draft Constitution Chapter Nine – The *Kadhi* Court," ICJ (K) provided a compromise recommendation for the benefit of the Kenyan nation. It is apparent from the brief presentation that the professional qualification and ability of the Chief *Kadhi* as provided in the Independence Constitution was inadequate. The report captured the state secularism premise used to oppose the inclusion of *Kadhi* court in the 2010 Constitution, which is also part of the problem of this study.

1.2.4 Muslim – Non-Muslim Relations in Kenya.

Tayob on the close relationship between religion and nationalsm in Kenya, Mwangi and the operations of *Kadhi* courts through history in Kenya, Bakari on the political manipulations of *Kadhi* court in Kenya, and ICJ (K) on the provision of *Kadhi* court in the Independent Constitution, as reviewed above, have all dealt indirectly on the Muslim- Non-Muslim relations in Kenya while, directly deliberating on the issue of the

Kadhi court. Ahmed Idha Salim in "Early Arab-Swahili Political Protest in Colonial Kenya" in *Politics of Nationalism in Kenya* as edited by Bethwel Ogot, gave a historical analysis of this relationship. Salim felt that colonialism disrupted, demoralized and caused discontent among the Muslims at the Kenyan coast. The colonial relationship with the Muslims often assumed shapes such as bitter rivalry, and sometimes became armed rebellion (see Salim, 1972). Salim maintained that the main lesson learnt from this contact between Muslims and Christian colonizers was that Muslims became pawns in a chessboard of imperial games. By dividing Muslims along racial lines, colonialism set in motion, a phenomenon where Muslims were politically a disappearing factor (Salim, 1972). The seeds for the deep mistrust between Muslim and Christians that partly informed the assumptions of this study had been sown.

Kahumbi N. Maina concurred that colonial era sowed seeds of discords between Muslims and Christians in Kenya in his article, "Christian-Muslim Relations in Kenya," (Maina 1995). Maina maintains that, when western imperialist met the Muslim Arabs, along the East African coast, they already had a history of rivalry and armed conflict as evident in the wars of crusades. The initial contacts between Muslims and colonial Christians in Kenya could not escape this previous experience, hence their earliest contact rested on the foundation of suspicion and sinister maneuvers. Colonial legacy further entrenched the suspicion as evident in its education policy that favored the Christian dominated upcountry, and marginalized the Muslim dominated coastal region among other aspects. This attitude persisted, and Maina maintains that contemporary Muslim-Christian relations in Kenya are characterized with misunderstanding and misrepresentation that associates Islam with fundamentalism among other things, causing

a dent in the image of Islam in the country (Maina, 1995). Had this stereotype eidetic image of Islam had anything to do with the opposition to the entrenchment of the *Kadhi* court in the Constitution during the constitutional review for the 2010 Constitution in Kenya?

This study while paying close attention to the literature reviewed and its implications, undertook to investigate the nature of state secularism in Kenya. It is clear from the discourse on literature review above, that the issue of entrenching the *Kadhi* court in an otherwise secular declared state of Kenya is not adequately addressed. The main emphasis of this study is to examine how the secular state concept had been employed to oppose the entrenchment of the *Kadhi* court in the country's Constitution.

1.3 Objectives of the Study

The general aim of this research was to investigate the premise that Kenya is a secular state, and how the secular state phenomenon was employed to oppose the entrenchment of the *Kadhi* court in the 2010 constitution of Kenya. In order to achieve this aim, the study had the following specific objectives:

(a) To examine the concept of the secular state in the Kenyan context.

(b)To examine the premise of the secular state as used to oppose the entrenchment of the *Kadhi* court in the 2010 Constitution of Kenya during the constitutional review moment.

1.4 Research Questions

This study aimed at responding to the following questions in the specific context of the *Kadhi* court debate during the constitutional moment of Kenya:

(a) How is the secular state concept understood in the specific context of Kenya as a nation?

(b) How does the entrenchment of the *Kadhi* court in the 2010 Constitution explain the secular model of Kenya as a nation?

1.5 Significance of the Study

This study was informed by the phenomenon of religious tolerance as a roadmap of realizing peace for all, and acknowledging that human beings have a right of religious differences. It is expected that human beings are likely to have different ways of life, in the light of their differing religious convictions. It is the peoples' duty to learn to accommodate and respect differences in matters of religion, which should be recognized and tolerated. This study, therefore, enhances a better understanding of the modern nation state as secular in general, and the secular state concept in the context of Kenya. In particular, this understanding sheds light on the protracted debate surrounding the entrenchment of *Kadhi* court during the constitutional review moment in the country. In general terms, the better understanding of the secular state concept in context of Kenya has the potential to impact positively on religious relations in an otherwise religiously plural country. This influence has the prospective to contribute toward national cohesion by enhancing better understanding among the diverse religious groups. The enhanced understanding eventually fosters co-operation, rather than, competition with respect to the religious groups in the country.

1.6 Theoretical Framework

The study is based on the socio-cultural change theory as it related to secular phenomenon in modern societies, and the critical and conflict theories as they applied to the secular state concept in relation to Kenya. Critical theory in a narrow sense designates several generations of Germany philosophers and social theorists in western Marxist tradition known as Frankfurt school. Some of the prominent figures of its first generation are Max Horkheimer (1895-1973), Theodor Adorno (1903-1969), Herbert Marcuse (1899-1979), Walter Benjamin (1892-1940), Friedrich Pollock (1894-1970), Leo Lowenthal (1900-1993), and Eric Fromm (1900-1980). Since the 1970s it has come to be associated with Jurgen Habermas.

Critical theory emphasizes that all knowledge is historical and biased and that objective knowledge is illusory. This perspective share a view that modern society must be understood in a broader context than that established by the acceptance of traditional explanations as we can also see the understanding of secular state as separating religion and state. Critical theory has something important to teach when it debunks convention, among many other ways, by challenging widely accepted but overdrawn dichotomies such as is implied in the secular state concept. It reveals the importance of context in determining social meanings. In particular this theory exposes the fragility of widely accepted distinctions, that not only express but that also animates social and political phenomena. The theory provides the descriptive and normative bases for social inquiry aimed at decreasing domination and increasing freedom in all forms. The ultimate goal of critical theory is therefore to transform our present society into a just, rational, human and reconciled society. In this way it is in solidarity with the aspirations of human rights and

social justice. Critical theory requires that we disarrange the current social order and challenge the terms and language in which this reality is described. In simple term critical theory is oriented toward critiquing and prescribing for the society as contrasted to traditional theory with its orientation to understanding, explaining, or describing the society (see Stanford Encyclopedia of Philosophy 2005). This study employed this theory to question the legitimacy of the literal use of state secularity premise in the argument against the entrenchment of the *Kadhi* court. The study assumed emancipator interest with Muslim minority rights in Kenya, which is in recognition that Muslims form a minority group characterized by their own religious identity and view of the world (see. Horkheimer, 1972). This differentiated them as an "ethnic" group distinct from the Christian majority in Kenya. The theory acknowledges that the secular state concept, as a cultural product, is influenced by the context in which it is produced or reproduced. Secular state phenomenon, therefore, is not a uniform phenomenon, cannot be understood uniformly and could not be applied rigidly as if it were. Critical Theory in this study provides avenue by which the two forces, of Muslims and a section of the Church opposed to each other on meaning of state secularism, re-articulate what it means to be a secular state in the context of Kenya.

John Horton of order and conflict theories has emphasized the conflict aspects in his analysis of the American society, sustaining that distinct social groups often express themselves through different vocabularies and experiences, which may result in clashing of positions about the same issue (Horton, 1971). The adoption of one position as 'the' position can result into a costly misunderstanding in which one social group may fail to

recognize itself in that society. This study is indebted to the conflict theory in its venture to establish whether Muslims and Christians in Kenya shared the same understanding of the concept of state secularity. Conflict theory in this case recognizes state secularity as a normative concept that could imply differently to diverse people. As a result, secular state as constitutional policy could be seized upon by one group to enhance their values and motivations, and rationalize for more socio-political control.

The socio-cultural change theory considers the dynamism of social and cultural aspects of human societies against the historical time. This theory is relevant to this study particularly due to its association with secular process outlining the relationship between religion and the modern societies often expressed as secular phenomenon. The first set of assumptions about secular process stemmed from ideas contained in the works of Karl Marx and Max Weber (Thompson, 1990, 79). Marx observed that the demystifying character of modern era had stripped social relations of "that train of ancient and vulnerable prejudices and opinions which shrouded them in the past." This process according to Marx had placed humanity in a threshold of new era ushered in by an enlightened transformation of society based on shared knowledge of a demystified social relation (Thompson, 1990, 77).

Weber put forward a claim that transformations in religious ideas and practice were a cultural pre-condition of the emergence of industrial capitalism (Thompson, 1990, 78). The emergent capitalism on the other hand acquired a momentum of its own and dispensed with religious ideas; a process he called disenchantment of the modern world. The result of the disenchantment had been the institutionalization of religion as witnessed in the diminishing presence of religion in modern societies. Both Marx and Weber linked

industrial capitalism with the secular phenomenon. Today most of the states in the world, including Kenya have adopted the secular state ideology with reference to public visibility of religion in state. It is in this respect that the opposition to the entrenchment of the *Kadhi* court during the constitutional review moment cited as one of the key arguments, that Kenya was a secular state.

The secular state phenomenon in this study is viewed in "socio-cultural evolutionary" terms pitting religion in society against historical time. The demand and opposition to the *Kadhi* court entrenchment in the constitution on grounds that Kenya is a "secular state" in this study is viewed as reflecting deep rooted "conflict" in the understanding of the secular state concept between Muslims and a section of the Church in Kenya. It is a further position of this study that the aforementioned conflict in understanding could only be resolved through a "critical" review of the secular state phenomenon and its implication for Kenya as a nation.

1.7 Scope and Limitation of the Study

The study was limited to the constitutional review moment in Kenya that culminated to the 2010 Constitution. Specific attention was on the aspect of the entrenchment of the *Kadhi* court in the Kenyan Constitution against the backdrop of opposition that Kenya is a secular state. The pros and cons of this Muslim judicial institution were beyond the scope of the study together with the general human rights discourse, especially the equal protection imperative and the minority protection end.

1.8 Methodology and Sources of the Study

The study used compressed ethnographic research that employed standard qualitative design (see Lecompte and Schensul, 1999, 88-89). Ethnographic research approach takes the position that human behavior and the ways in which people construct and make meaning of their own lives and the world, are highly variable and locally specific. The nature of the problem of the study implied that there was no single understanding of the secular state phenomenon. This required the researcher to go beyond to an open context, giving up open positions and opening up to evolving understanding in the course of the study. Compressed ethnographic design was appropriate since the researcher was already familiar with the field and cultural context of religious communities in Kenya. In this respect the researcher used inductive strategies to build local secular state understanding, by using multiple data sources that included quantitative data from CKRC, newspaper sources, and qualitative data from key informants which formed the main basis of the primary research. The resultant data was analysed within socio-political and historical context and the concept of national culture with regard to religion used as a lens through which to interpret results, and establish the nature of state secularity of Kenya.

Cognitive elicitation techniques in the form of in-depth interviews with key informants, was part of repertoire of data collection techniques used in this design. The basic methods used included critical analysis, historical and descriptive. A critical analysis of data from the defunct Constitution of Kenya Review Commission (C.K.R.C.) with regard to the issue of *Kadhi* court and the debates surrounding it was undertaken. The Constitution of Kenya Review Commission (CKRC) during its tenure had employed

a large number of researchers, analysts, data clerks, and short hand typists, to transcribe records of hearings, and analyze these and other submissions with regard to the views of Kenyans during the constitutional moment (CKRC, 2002, 5). Reports of constituency constitutional forums, including summaries as well as transcripts of public views were prepared and sent to C.K.R.C. Through computer programs especially devised for the CKRC, all the submissions were analyzed and tabulated enabling the commission to determine the preferences of Kenyans on a host of issues including the entrenchment of the *Kadhi* court in the constitution at the constituency, district, province and national levels. The views were also broken down by gender and the nature of the person or group making submissions. Aggregated and disaggregated tables on all these variables were made available to this researcher.

The result of further analysis of the tables on variables, the C.K.R.C report, and the recommendations with particular reference to the *Kadhi* court formed the basis of a qualitative interview with key informants from the Muslim and Christian organizations in the country. These interviews shed light on the respective meanings of state secularity concept among Muslim and Christian informants. The ensuing data became the focus of informal online discussions through facebook that brought about involved online participation of the researcher and the informants on the issue of the entrenchment of the *Kadhi* court in the constitution. In particular, the online research consisted of internet accessed newspaper archives documenting arguments surrounding the jurisdiction and legality of the *Kadhis*' Court from such sources as the Daily Nation in conjunction with facebook.com. One notable archive was the Daily Nation's article "Muslim Cleric's want *Kadhi* ruling stopped" following a three judge bench ruling that declared the inclusion of

the *Kadhis*' Court in the New Constitution as unconstitutional. By accessing these archives through the internet I was also able to gather Daily Nation reader comments, and notably this article alone received 793835 "likes" of mixed reaction towards the three judges' ruling (https://www.facebook.com, 2010). This captured the public discourse about *Kadhi* courts pitting Muslims and Christians in adversarial way that confirmed the level of political tensions surrounding the *Kadhi* court debate during the constitutional moment. Due to ethical considerations, I will most of the time refer to the impressions I got during the course of this study rather than cite the particular concern of the respondents.

The study relied on visits to University Libraries such as Margaret Thatcher library at Moi university, Post-Modern library at Kenyatta university, and Jomo Kenyatta memorial library at Nairobi university. The content analysis involved in the library research formed the basis of case studies that provided analysis of contemporary Shariah operations in the selected countries of Egypt, Libya, and Nigeria. This selection was based on the convenient sampling of Egypt, North Africa and the Sudan belt respectively as major Islamization zones in Africa (see Trimingham, 1968). The case studies lay considerable emphasis on the modes and forms of public application of the shariah as it is conditioned by the socio-political realities and Islam. At this stage of library research, historical method was also used to investigate the phenomenon of state secularism, and the institution of *Kadhi* court, while the descriptive method was used to elaborate the operations of the *Kadhi* court in Kenya since independence. The archival material from the Kenya National Archives (KNA) provided important information relating to the *Kadhi* court during the pre-colonial and colonial periods. Most of the materials in

reference, relate to the British period, and in particular to the official agreements on *Kadhi* courts involving Britain and the Sultan of Zanzibar.

The resultant data from the research is contained in the next five chapters that constitute the final report of the study. Chapter two of the report analyses secularism phenomenon, modern nation state and the Muslim responses, and the secular state phenomenon in Africa. Chapter three provides information on leadership, shariah, and its application among Muslim societies. Chapter four analyses constitutionalism and ethnic diversity as reflected in the *Kadhi* Court Stipulation in Kenya. Chapter five examines the Constitutional debates surrounding the *Kadhi* courts in Kenya during the constitutional moment. The final chapter which is chapter six of the report constitutes the summary, findings, recommendation and conclusions of the study.

CHAPTER TWO

Secularism, Modern Nation State and Muslim Responses

2.0 Introduction

This chapter provides information that links the phenomena of secularism, secularization, and the secular state. The chapter traces the Western roots of the secular phenomenon and the mixed response it has drawn among Muslim scholars and societies. The common circumstances of religion as it is occasioned by the modern nation state are also considered in this chapter. The chapter concludes with an examination of the constitutional application of secular state phenomenon in Africa.

2.1 Western Roots of Secularism

Jawaharlal Nehru considers the year 600 B.C to be a period of great interest in relation to the religions (Nehru, 1982, 37-39). Roughly about this time, several founders of religions arose in different countries from China and India to Persia and Greece. These people did not live at exactly the same time, but were near enough to each other in point of time to justify the conclusion that, there was a new wave of thought going on throughout the world. Nehru while considering this position, has maintained that this period was marked by a wave of discontent with the existing conditions, as a result of which there was a yearning and aspirations for something better (Nehru, 1982, 37-39)

This period saw the rise of Buddha and Mahavira both in India, Confucius and Lao Tse in China, Zarathustra in Persia, and Pythagoras in Greece. Much about Pythagoras is not known and some people doubt if he ever existed. Zarathustra is linked with Zoroastrianism and its development, while Mahavira is considered to be the historical founder of Jainism in India even though the conceptual traditions of this religion pre-date him. Gautama Buddha on the other hand is accredited with the founding of Buddhism (Nehru, 1982,37-39).

In China the two great men, Confucius and Lao Tse founded Confucianism and Taoism respectively. Confucianism and Taoism may not be considered religious traditions in some ordinary sense of the word, but rather as systems of social and moral behavior. Smith Huston while writing on Confucianism of China has delved deeper into the happenings of the period around 600 B.C. His analysis of pre-Confucius China supports the generalizations of Nehru regarding the same period as period of religious interest (Smith, 1957, 147).Huston observed that the period between 8th and 3rd Centuries B.C in China was neither more nor less turbulent than in the other lands, though it witnessed the collapse of Chou Dynasty and its ordering power (Smith, 1957, 147).

Prior to this period, maintains Huston Smith, customs and traditions automatically provided sufficient cohesion to keep the community reasonably intact. This cohesion in society was instinctive and developed out of centuries of generations feeling their way toward satisfying their needs, and moving away from self-destructive aspects. No council set out to consciously decide what values the group wanted and what rules would promote them. However, once a pattern developed, it was transmitted unthinkingly from generation to generation. It is these customs and traditions that witnessed collapse during

the 600 B.C period, which was attributed to social development (Smith, 1957, 147). Huston notes in this regard that pre-Confucius China had reached a new point in her social development, marked by emergence of large number of individuals. Reason was replacing social habits, and self-interest becoming more valued than the expectation of the group. The fact that "ancestors had done so from time immemorial," could no longer automatically count as sufficient reason for individuals to follow suit. It was an era when traditions and customs were no longer adequate to hold society together, presenting a great crisis to human beings.

Confucius responded to the situation by advocating for what has been termed as deliberate tradition, as opposed to spontaneous tradition that had prevailed before in the early Chinese religion and its sense of continuity with the ancestors. Confucius, in this way did shift the religious emphasis from heaven to this world while not eliminating the spirits out of the picture entirely. Confucius maintained that though the spirits should not be neglected completely, people should come first. The worldliness and practical concern that was later to characterize Chinese way of life was coming to the fore. Arguably, Confucius secularized ancient Chinese religion by crystallizing it in a distinctly this worldly orientation (Smith, 1957, 147).

Treating secularism as a worldview, it is noted that the phenomenon involves a view of super sensible world, humanity, and nature. Secularism does not necessarily deny the super sensible world's existence; it simply marginalizes the super sensible and concentrates on the worldly (humanity and nature). Instead of emphasizing the metaphysics of transcendence, where explanations come from beyond, secularism operates on metaphysics of immanence, where answers are to be found from within

(Elmessiri, 1996, 43). Viewed in this sense, Confucianism can be considered as an example of one of the pioneer cases of secular phenomena in the recent history of the world. The relationship between the form of secularism presented by Confucianism, and the contemporary forms of secularism is less clear. However, it all confirms the themes of human freedom, moral responsibility, and ability to transcend as among the major themes throughout time in human history. These themes have acquired a particular poignancy in the modern times, with the re-emergence, and gradual unfolding of secularism as a phenomenon.

Secularism of modern times can as well be viewed as a comprehensive world outlook, that operates at all levels of reality. Harvey Cox in 1965, described the secular world thus,

> It stands out as both the pattern of our life together, and the symbol of our view of the world. Today the universe is viewed as the city of man. It is a field of human exploration and endeavors from which the gods have fled. The world has become man's task and responsibility (Cox, 1965, 1).

Secularism today is the underlying, and overarching ingredient in the modern western civilization. As an ingredient, it operates on all levels of reality, where it shapes modern person's dreams, public life, and conduct (see Elmessiri, 1996, 44). As a world view, secularism operates in terms of metaphysics of immanence and materialistic rationalism, where the center of the universe is here in "this world," and can be found in both humanity and nature, or in either. The secular outlook consequently prioritizes the sake for humanity and nature. In this way, modern secularism operates on a dualism of nature

and humanity that some scholars have visualized as illusionary (Elmessiri, 1996, 43). This is because the humanity-nature dualism resolves itself into monism with the realization that the ultimate referent is not humanity but nature. This process has been described as follows:

> The humanity–nature dualism turns into monism when solipsist self-centered self that has placed itself above nature realizes that the ultimate referent is actually not humanity but nature….Humanity's whole being within that framework of reference is not determined by any human laws, but rather by ferocious natural (material) forces and drives that are either immanent in its physical being e.g. genes, instincts, libido, eros), or in the physical nature surrounding the individual (economic or ecological factors)(Elmessiri, 1996, 44).

Viewed in this dimension, secularism as a world view turns human beings into mere natural beings. At the social level, a secular human being is either economic man, propelled by economic self-interest, the profit motive and the desire for accumulation of wealth and goods, or as a physical or libidinal man, propelled by the desire for immediate self-gratification, eros, and the endless pursuit of pleasure. The natural man as a product of secularism is subject to natural law, and to a variety of material and natural determinisms (Elmessiri, 1996, 44).

Like many western phenomena, secularism claims a foundation of rationalism, and often shuns away any form of belief on the surface. Ironically, due to the finitude limitation of human nature, all human ventures must be based finally on belief, and like

religion, secularism also thrives on belief. Secularism in this aspect can be redefined as the belief in the universal validity of natural law, and its applicability to both physical and human nature (Elmessiri, 1996, 43-44). Secularism can also be labeled as naturalization, because it explains reality not in terms of human norms that emphasize the humanness itself, but in terms of nature and matter, thereby emphasizing the natural over the human.

Secularist reduction of everything to one natural law that is immanent in nature, provides the foundational basis for the process of deconstruction, neutralization and desanctification not only of nature, but also of humanity. This explains why everything in the secular world view is amenable to measurement, quantification, instrumentalization, utilization, planning, technocratic engineering, and programming. Steve Bruce refers to this feature of secularism as the replacement of the ethical by the technical concerns (Bruce, 1990, 8). Elmessiri on the other hand refers to the same features of secularism as more close to value free rationalism that sees reality in terms of a narrow and constricted rational material calculus (Elmessiri, 1996, 45). Even human mind is not spared under this naturalistic frame of reference, as it grants sanctity to nothing and see the world as ultimately knowable, controllable, and usable. The light of reason under this scheme of things knows no limit, it penetrates everything like an x-ray including areas previously held as sacred, judging everything by an objective and neutral criteria.

Secularism is considered to be a value free process, though in reality it results in (meaning it encourages) the control, conquest and harnessing of all human and natural resources into the service of the individual with the most power. In this case, secularism thrives on a thinly veiled ethics of self-interest, conquest and power behind the façade of neutrality. The preferred way of conduct for individuals in this scheme is to maximize

personal power in order to trump over others. Consequently, power in the secular context has been perceived in dynamic terms as a continuous antagonistic relationship with opposing power (Malan, 2012, 79).In fact, according to Thomas Hobbes, it is the antagonism of power that is the basis of the modern secular state (Hobbes, 1969, 434).Hobbes maintains in this regard that the creation of secular states, also referred to by him as Leviathan or mortal god, condenses the collection of antagonistic individual wills, which made the state of nature so miserable, into a single will; the potent will of the state government which becomes a mortal God to which citizens owe their peace and defense (Hobbes, 1985, 161).

The foregoing discourse on modern forms of secularism confirms the assertion that it started off with the declaration of the marginalization of God, and of the centrality of humanity and/or nature commonly referred to as "this worl" (Elmessiri, 1996, 46). Secularism as a phenomenon involves the encroachment of secular tendencies and worldview and is easily conceived as a continuum ranging from public secularism (involving economic and political sector) on the one hand, and decentering or debunking of humanity on the other. Human aspects such as philosophy and imaginations are not spared either, hence justifying the assertion that secularism operates at all levels of reality. Consequently, it can be observed that different world societies are at different levels in this continuum, so are individual persons. As the secular phenomenon spreads geographically, so does it also in character.

Elmessiri's category of the natural man as a product of secularism and as a subject to natural law, does not settle well with Cox who prefers to employ the term secular man in reference. According to Cox, the secular man can still enhance morality and humanity

in general, when religion in the modern secular world is perceived in secular terms, and God viewed in political terms. This is to say that religion in the secular society must engage people at particular points, in their "this world" life and not just in general. The word of God as expressed in religion must be word about people's lives, their children, their jobs, their hopes. It must equally be a word about the bewildering crises within which people's personal troubles arise, a word that builds peace, that contributes to justice and which hastens the day of freedom (Cox, 1965, 256). It is obvious that unlike Elmessiri's general approach, Cox's approach to secularism is from a Christian theological perspective. Still, the relationship between secularism and the keeping of human life human in the secular world as expressed by the two writers is problematic.

Two phenomena are held to have had strong relationship with the development of secularism as a worldview, namely development of Western science and the reformation of the Protestant Church both in Western Europe, (see Ahaya, 2001, 79-81). How and why, western science as it is known today began in the 16th and 17th century is not adequately documented, but it is suggested that the emergence of western science took place in form of a revolution, in which its relation with religion hitherto peaceful, could henceforth be described as characterized with tension (Habgood, 1964, 22). The deteriorating relationship between emerging western science and religion, as occasioned by renaissance, constituted the roots of secularism. Western science was engaged in reducing everything about the world to measurable aspects only. There was a hidden assumption that western science somehow got to grips with reality in a way that philosophy and theology did not, and that the reality described by science was the only reality.

An odd picture of reality was, therefore, presented in the phenomenon of western science; a reality that was devoid of the traditional matter-spirit duality (Habgood, 1964, 20). Here lie the roots of secularism in an atheistic rather than agnostic form inherent in the western science, which introduced new assumptions about nature and society. The overall effect of the secular western science was the enhancement of people's capacity to plan their own wellbeing. A significant lesson of the history of secularism is that the phenomenon is complex and is often inherent in modern and western phenomena, which double up as the major agents of secularization in the world today.

2.2 Historical Development and Creation of Secular States

The institution of religion is universal in social time and space, but religious beliefs and practices have been, and are endlessly various. Therefore, the universality of religion can only be explained in terms of social functions that religion fulfills. Religious organizations such as the Church and the mosque are not only promoters and guardians of religious beliefs and practices, but are also promoters of "this worldly" organizations actively engaged in political activities. Such religious organizations are also in part economic institutions; they own property and invest their contributions and endowments. This explains why throughout the ages, religious organizations have swung back and forth between proclaiming social revolution and blessing the status quo (Green, 1956, 461-63).It is also true that throughout history, organized religious bodies that includeall or at least a majority of the people within a society have always developed religious justification for the social distribution of rank and power. Throughout the medieval epoch, the Church in Europe was the political superior of the nation. The universalism of

the Church was based upon much more political aspects than religious ideology and doctrine. This aspect could be seen for example in popes who could make or break emperors and princes because the people of the west acknowledged the Church to be a worldly power superior to that of the nation. At that time, there was not a rival political institution that commanded a greater mass, love, devotion and sacrifice than religion (Green, 1956, 462).The medieval thought primarily proceeded from the point of departure that every person should endeavor to ensure the redemption of their soul first,which was the essence of one's earthly existence. This was not an abstract ideal, but a practical devotional task (Viljoen 1974, 158).

Ever since the last quarter of 18thcentury, the nation state has been religiously venerated. The State has developed its own ideology that leaves an imprint on the modern man, fosters dependence upon the state, and inculcates a belief in, and loyalty towards the state (Malan, 2012, 1).Bikuh Parekh asserts in this regard:

> All citizens are expected to privilege their territorial over their other identities; to consider that they share in common as citizens far more important than what they share with other members of their religious, cultural and other communities; to define themselves and relate to each other as individuals to abstract away their religious, cultural and other views when conducting themselves as citizens; to relate to the state in an identical manner; and to enjoy an identical basket of rights and obligations. In short the state expects of all its citizens to subscribe to an identical way of defining themselves and relating to each other and the state. This shared political self-understanding is its constitutive principle

> and necessary presupposition. It can tolerate differences on all matters but not on this one, and uses educational, cultural, coercive and other means to secure that all its citizens share it. In this important sense it is a deeply homogenizing institution (Parekh 2000, 185).

Prior to advent of nation state, wars of religion had always included nationalistic as well as religious movement. However, since the late 18thcentury, religion has been surpassed by nationalism as the chief factor in human group relationships (Wittmayer 1947).During the medieval periods, mankind notoriously fixed his gaze toward the heavens seeking for divine revelation. In the extroverted period of the renaissance, this gaze shifted horizontally toward mankind and the world. In the resultant atmosphere of human confidence, intellectual focus shifted to what humankind had to say, instead of remaining fixed on divine revelations as before (Malan, 2012, 3). Runkle maintains that the driving spirit behind renaissance was threefold: rediscovery of the classic heritage, secularization and individualism. The new spirit was inspired by an interest in the classics, secularization described the nature of the newly recognized values, and individualism expressed the way in which the new values were experienced and pursued. The human-centered and world-centric atmosphere of the renaissance caused the religion-inspired medieval unity to start disintegrating (Runkle, 1968, 167). Religion did not completely vanish into oblivion overnight, but gave up its generally superior position.

Thereafter, the nation-state has become the arch-rival of the Church as a supreme repository and enforcer of moral norms. The nation-state is increasingly conceived as infallible and as the saying goes, “my country may she always be in the right, but my

country right or wrong" (Green, 1956, 462).The interests of the nation-state are supreme over those of any other organization or group in the modern society. Yet the modern nation-state is not different in character from religion. In this secular age, the nation-state is grounded on beliefs and faiths, which like those of religion, cannot be verified by logic or western science. As traditional supernatural religions recede, the resulting gap in faith in the nation state is filled by doctrines that are quasi-religious and also pseudo-scientific, even though the same doctrines claim the prestige of western science. The nation state as a result, has been labeled "the new religion" (Green, 1956, 463). This explains why the national flag of any modern nation state is everywhere a sacred symbol to be respected, and never to be defiled (Schuman, 1933).

The partial displacement of God by the nation-state as an object of veneration occurred in two dimensions. The first dimension involved the reduction of God to national boundaries, serving the state. This path was followed by most of the modern western nations, for example, in the case of Benito Mussolini who courted Catholic Church's support for Italian nationalism culminating in the signing of a concordat. This agreement saw the Roman Catholic Church renouncing its temporal ambitions for Italy, initiating a temporal separation of the Church from the Italian state (Wittmayer, 1947). The spirit of cooperation between the Church and state confirmed by the signing of the concordat implied that the resultant secularism (separation of the state from the Church) was not atheistic in nature, but the Church became a passive public participant.

Secularism in the other Western nations like Britain, and the United States did not go as far in the separation between the temporal and the 'other worldly' as was the case of Italy in either practice or principle. Secularism in these countries differed more in

degree than in kind (Green, 1956, 465). The state-religion separation entailed the prevention of religion from interfering with state affairs, controlling governments and exercising political power. United States, for instance, became legally secular upon the establishment of the state, and witnesses presidents holding the Bible, while taking oath of office and add, " so help me God", neither of which is mentioned in the Constitution that separates religion and state. France, on the other hand, became secular due to secularization of state that entailed freeing it from religious tutelage in a way that was more assertive, or hostile to public visibility of religion (Kuru, 2007, 570-71). In France today, many Christian holidays are official holidays, and the teachers in Catholic schools are salaried by the state. The case of the United Kingdom presents a unique situation of a secular state under a state religion that only has a symbolic meaning. Secularism in this case operates in a guise that coincides with some degree of official religiosity.

In all the cases of state secularism, the nation state as it relates with religion is venerated, elevated, and protected as it continues to acquire more importance in the modern society. In fact, the nation state is increasingly perceived as natural and immortal; a misconception that elicits acceptance and resignation to it, and thus citizens resignedly act in accordance with its dictates. Religion on the other hand continues to face relegation in the same society hence the genesis of the modern nation state (Green, 1956, 461-68).

2.3 Ambiguous Attitude of Muslim Societies toward Secularism

In contrast to the rise of Secularism in the Western world, the origin of the phenomenon in the Muslim world occurred in completely different circumstances. Before Napoleon's invasion of Egypt in 1778, the entire Muslim empire dominated by the Ottoman Turks was relatively Islamic in norms, laws, values and traditions (Kabiru, 1992). What was to follow Napoleon's invasion was phenomenal and the Muslim world is still recoiling from its impact and the attendant influences.

Shabir Akhtar confirms western influence on Muslims when he observes that since the end of 19th century, the entire house of Islam has survived on an intellectual overdraft. The west is no longer some abstract force in the distant land, "Muslims are living in the west" (Akhtar, 1980, 319-27). As a result of the western influence on Muslims and their general way of life, many observers contend that the main socio-cultural challenge facing Muslims in the contemporary world is how to deal with westernization and its attendant values of secularism, nationalism, and capitalism, and still maintain an Islamic identity (Akhtar, 1980, 319-27).

Secularism has been argued to be incompatible with Islam for it ignores any form of theocracy. Proponents of this position often employ civilizational theoretical approach focusing on Qur'an based religious essentials to explain the impact of Islam on socio-political order. They argue that the distinction between the Church and state did not exist in Islam, claiming "Render unto Caesar" is a Christian position that separates state and religion (Kuru, 2007, 572). Supporters of this view assert that secularism encourages different set of policies based on science and human made laws rather than divine

criteria, relegating religion to the realm of private preference and judgment (Mutalib, 1996, 97). Mamadiou Dia while maintaining the incompatibility of Islam and secularism has noted that, the later sacrifices the unitary character of Islam to a dualist point of view that is foreign to it and in many ways equivalent to Christianization of Islam (Dia, 1980, 295-303). Modernity, and by extension secular phenomenon, is in a central sense inescapable. A part of the Muslim population maintains that modernization and progress should be sought in the contemporary world, but without relinquishing the accomplishment of the Islamic civilization that characteristically operates with Allah in sight (Nadwi,1978). The aim is to create an Islamic renaissance that can deliver the Muslim world from the state of backwardness, while protecting them from the colonial and post–colonial influence. In general, it is from the same modernization that the western values and by extension secular phenomenon encroaches to the Muslim world.

Shabir Akhtar points out in regard to secularism that, today even the traditional Muslim believer is far more secularized than they themselves might imagine (Akhtar, 1980). He further asserts that, secularism is a continuum that goes beyond the mere separation of state. Hussin Muttalib blames secularism among Muslims on lack of prioritization, citing the neglect of the institution of the family as evidence. This neglect accordingly, has resulted in social ills such as drug addiction, high crime rates, underachievement in education, and a highly secularized outlook on life (Mutalib, 1996, 97). It is noted in the context of this study that neither the Christian nor Muslim groups in Kenya opposed the separation of state from religion as was stipulated in the 2010 Constitution. A key Muslim respondent on Kenya as a secular state observed in this respect, “that state like religion is from God and must work together for the benefit of

all." He further added that Kenya was secular as it separated religion and state and people however must still fear God (Interview with a key Muslim informant in Nairobi on 6th February, 2010). It is clear that this understanding from the Muslim respondent is qualified and does not settle exclusively on separation of religion and state as the essence of state secularism. A Christian perspective to secular state concept with reference to Kenya, apart from citing the case of Caesar and God, also maintained that, "constitution should be a symbol of unity for all Kenyans, why play chauvinist to any single religion as if all Kenyans profess its faith," (Interview with Key informant from Catholic Church, 2012). This general acceptance of the separation of state and religion on the part of both Christians and Muslims in the backdrop of the demand for and opposition to *Kadhi* court entrenchment in the Constitution is an initial pointer to the complex nature of secular state concept in the Kenyan context.

A section of Muslim writers, however, maintain that neither secularism nor secularization as is seen in the separation of state and religion premise is entirely necessary in the Muslim world. They argue that Muslims can achieve progress and development without having to erect a wall between their religious values and their livelihood (Nadwi, 1978).

There is however a rationalized view of secularization from the point of view of some Muslim writers, informing that secularization does not mean the application of secularism (the later as a world view), but a liberating development. Secularization is not the transformation of Muslims into secularists, rather it is the temporizing of values that are worldly and freeing the *Umma* (Muslim community) from the tendency to spiritualize such values. The question whether "God and Caesar" are one or separate in Islam is a

problematic theoretical principle, but a practical reality as can be deduced from the significant levels of secularism. It is noted in support that the Muslims in Kenya were concerned with the issue of *kadhi* court, than the separation of religion and state during the constitutional moment in Kenya.

Ndzovu maintains that this position of not distinguishing between religion and politics in Islam in theory is widespread among scholars like Khurshid Ahmed, Mohammed Asad, Muhammad Hassan Al-Maududi, and Hassan Al-Turabi (Ndzovu, 2009, 54-58). The general argument advanced by these scholars is that from the beginning of the history of Islam, religion and politics were not separate. The leader of the Iranian revolution of 1979, and the first spiritual leader of the Islamic state of Iran supported this position by citing the life of Muhammad as both a messenger of God, and a political leader of the state of Madina. Ayatullah Khomeini supported the concept of Islamic state arguing:

> As for (those) who consider Islam separate from government and politics, it must be said to those ignoramuses that the holy Quran and the Sunnah of the prophet contain more rules regarding government and politics than in other Matters (Ndzovu, 2009, 35).

There, however, exists an alternative view that Islam does not in any way specify the types of government. Muslim scholarship in support of this view include studies by Ali Abd al-Raziq, Mohammed Khalaf-Allah, Norma Salem, Nazih Ayub, Said al-Ashmawi, Husain Fawzi Al-Najjar, and Sadiq al-Mahdi (Ndzovu, 2009, 54-58). Mohammed Said al-Ashmawi is in agreement with al-Raziq when he comments as follows:

> There is no passage in the Quran about such a state and form of government, because the essence of religion including Islam is man without regard to his territorial location, racial division or variety. Until the death of the prophet, there was no state in Islam; Medina approximated a city state. There was only a Muslim community led by the prophet. The basis of loyalty was religious belief, not any territorial state or nation. The Quran and Shariah always addressed themselves to the faithful, not the citizens. In fact the idea of citizenship was alien and unknown to Islam (see Vatikiotis in Ndzovu, 2009, 56).

Like al-Raziq, al-Ashmawi too maintains that Islamic sources emphasize religion, rather than the territory as the essence. This can be used to argue that, the religion of Islam does not necessarily connect to the state as an issue of immediate necessity.

As the scholarship debate on religion and state relations in Islam rages on, a 2005 report on state-religion relations in forty four Muslim countries concluded that majority of the world's Muslim population live in countries that either proclaim the state to be secular, or that make no pronouncements concerning Islam to be the official state religion (see U.S. Commission on International Religious Freedom, 2005). This situation necessitates a revisit of the intriguing issue of compatibility of state secularism and Islam. Ahmet Kuru stresses that such question of compatibility is misleading unless there is an awareness of passive and assertive types of state secularism, as well as diverse interpretations of Islam (Kuru, 2007, 568-94).This author maintains in regard to compatibility of Islam and assertive secularism, that assertive secularism has had

problems, not only with Islam in Turkey but also with Catholicism in France (Kuru, 2007, 468-94).A practical reflection of this abstract debate is seen in the popular disdain toward secularism in many Muslim countries, and Muslims should therefore rethink about state secularism, recognizing the alternative passive secularism model that tolerates public visibility of religion (Kuru, 2007, 568-94).

The discussion is taken up by the intellectual leader of the largest faith-based movement in Turkey, Fethullah Gülen, who offers a third way between the two extremes on state-religion-society relations. Gülen endeavors to show an interpretation of Muslim secularism that inhabits religious and secular worlds simultaneously, critically engaging each other and which blurs conventional political lines on the hotly debated issue of state-religion-society relations (Yilmaz, 2012, 43).This understanding is referred by Ihsan Yilmazas "Islamic twin tolerations," which challenges the artificially constructed binary oppositions between Islam and state. It is a view that resonates with the Habermasian's "religion in the public sphere," (see Habermas, 2006,1-25). It argues that religions can legitimately have demands based on their background in the public sphere, but in the final analysis, it is the legislators' epistemic task to translate them into secular language in the legislative process (Yilmaz, 2012, 43). The Muslims in Kenya's demand for the entrenchment of kadhi court in the Constitution resonates with Yilmaz's "Islamic twin tolerations" as stated above. It was clear that the Muslims in Kenya looked to the secular state tools such as the legislature to operationalize the *kadhi* court.

2.4 The Modern Nation State and the Secular State Phenomenon in Africa

The separation of religion and state, like many western concepts, has become a trite conventional constitutional principle founded on practicalities of constitution making in many African countries, as well as the rest of the world (Vyver and Green, 2008, 344). Once again we are compelled to revisit Kuru's argument that the modern state policy differences toward religion are the result of ideological struggles at critical junctures in a country's history. Applying this argument as an analytical tool in the case of Africa confirms colonialism as such critical juncture in the history of many African countries. The same tool justifies the emergence of African independent Church phenomenon in the general scheme of African independence struggles. However, the analytical tool raises more questions than answers when applied from the point of view of state public policy on religion in Africa. For example, what is to be taken as the critical historical juncture; the ideological and institutional path dependence that informs on state secularism policy in Africa?

Clearly, the separation of religion and state as a constitutional policy is one of the confusing remnants of colonialism in Africa, when an African institution is denoted with a typical western conception under the assumption that the substance of the subject concerned corresponds with that of the western concept (Vyver and Green, 2008, 344). Many writers on Africa have in this regard expressed skepticism about the conventional wholesome lumping of African nations together with rest of the world when it comes to addressing the issue of modern secular state. A practical expression of this skepticism is visible in former colonies in Africa that have since relapsed into tribal and ethnic

loyalties, rather than the assumed national loyalties as the real binding ties between the people (Okulu, 1974, 9). Consequently, this study maintains that in many contemporary African nation states, the national bond merely touches on the periphery of the people's consciousness, and so is the separation of religion and state, or the secular state concept.

Henry Okullu points out that former colonies have since relapsed into tribal loyalties as the only binding ties between people despite living for a while in the Christian momentum of the missionaries. As a result, it is not an exaggeration to state that Africans now find themselves in a moral wilderness, building states without values (Okulu, 1974, 9). Mbiti expresses the same sentiments when he notes that Africans have been uprooted, but have not necessarily been transplanted (Mbiti, 1969). The same sentiments seem to inform Chinua Achebe's title, *Things Fall Apart* (Achebe, 1958). For this study, the sentiments of building states without values find relevance when it is pointed out that some of the values expressed in the Constitution under the influence of common constitutional practice, are not true reflection of the values as maintained by Africa in general, and the Kenyan nation in particular.

Consequently, in their attempts to articulate the constitutional relationship between the state and religion, African states have often found themselves in dilemma (Okulu, 1974, 9). On the one hand, Africa has tried to reject religions' moral values, or has not grasped their full implication. On the other hand, there is no substitute for a modern nation state. This is Africa's moral dilemma that is further confounded by the fact that without religion, the Constitution and the eventual legal statutes forfeit their ethical foundation and gradually crumble into formalism (Vyver and Green, 2008, 355). The moral dilemma of post-colonial Africa eventually find exhibition in African

constitutions that reflect all varieties of religion-state relationship, which include, state and religion shall be separate; there shall be no state religion; the state shall treat all religions equally; and that the state will be secular. All these statements are not informed by a critical historical juncture based on either institutions or ideology. This study, therefore, is in agreement that constitutional statements on religion-state relationship are often fiction, rather than facts (Vyver and Green, 2008, 343). There was confirmation of this position in this study, when against the wish of a section of Christian clergy, the secular state constitution with the provision for *Kadhi* court was overwhelmingly passed at a referendum by the Kenyan nation.

2.5 Conclusion

This chapter dealt with the secular phenomenon establishing that it was a historical phenomenon that affected human beings at the various historical junctures. It examined the secular phenomenon as it interacted with the State from the context of disintegration of the notoriously religious medieval states. This disintegration gave rise to the first ever conception of the modern secular states also referred to as the "mortal God," due to their tendency to surpass the authority of religion, placing the later at the service of the nation state. It is apparent that in theory, there was a lot of ambiguity surrounding the Muslims' perspective with regard to compatibility of Islam with secularism. It is evident that state secularism is a practical reality among many world Muslims. The question of compatibility of Islam and secularism was therefore, fast becoming irrelevant as its place was assumed by the distinction on whether it is assertive or passive secularism. The cases

of Turkey and France as advanced by Ahmet Kuru indicated that assertive secularism did not portend well for any religion, Islam included (see Kuru, 2007, 568-94)..

Clearly, the secular state phenomenon had gained currency in most of the modern states of the world including African states. However, the secular state phenomenon as a public state policy is still alien in Africa since many African states lacked in their histories, a critical ideological moment that would inform on the appropriate public policy of state on religion. How has this lack of critical ideological moment affected the practice, and by extension, the understanding of the secular state concept in Africa in general, and Kenya in particular? Before the study examines this issue with reference to the entrenchment of the *Kadhi* court in the 2010 Constitution of Kenya, the study first turn to the analysis of the *Kadhi* court as an Islamic institution in general, in the next chapter.

CHAPTER THREE

Islamic Jurisprudence, Leadership, and Shariah Application among Muslim Societies

3.0 Introduction

This chapter while acknowledging that the concept of leadership is generally misunderstood, attempts to analyze the structure of leadership in Islam. The analysis is based on the Quran as the primary source of shariah and why Muslims through history have been pre-occupied by efforts to align their lives according to the tenets of Islam. The effect of modernity on shariah is also examined to gauge how it influences the issue of leadership in various Muslim societies. Related to leadership in Islam, the chapter examines the application of shariah in the selected African countries of Egypt, Libya, and Nigeria. The examination lays considerable emphasis on the modes and forms of public application of the shariah as it is conditioned by the socio-political realities and Islam.

3.1 The Historical Development of Islamic Jurisprudence and Leadership: An Overview

More often leadership is assumed to be a concept that should not be difficult to define. Frederic N. Mvumbi, however, cautions that the concept of leadership is misunderstood, and what constitutes leadership in the dominant group in society is often

confused to be “the leadership concept” (Mvumbi, 2008). Theories on leadership concept in the past two decades show a series of changes as summed up by Alex Bavelas, arguing that early notions about leadership were explicitly associated with special powers, where an outstanding leader was also considered to posses reserve of extraordinary power, which hypnotically compelled obedience as illustrated in the trait theory of leadership. Today theorists maintain that leadership is related to particular situations (see Cftr. Htt/wwwnurradeen.com/currentissues/islamin Africa.htm).

This study considers that most of the concepts of leadership are western oriented concepts that gauge all modes of leadership against the western leadership patterns. It is often not taken into consideration that Christian oriented leadership does not have the same sub-structure as the Islamic oriented one. Casual observation of Islam in the contemporary world for example, will erroneously give the impression that Islam lacks central leadership acceptable to majority of Muslims. This is often the case when leadership is viewed from the perspective of Christianity, and in particular that of the various institutions of the Catholic Church. This clearly implies an attempt to adapt alien social life against the Islamic leadership format (Mvumbi, 2008).

The presence of Islam for not less than fourteen centuries testifies to the existence of leadership that has managed to keep all the Muslims together. Otherwise, how could the Muslims have survived up to the present without leadership? What is the nature of the organization of Islamic leadership? Of interest to this study is to establish the implication of Muhammad’s leadership to Islamic structure of leadership. The crucial question is to find out whether the prophet was a messenger, or king-messenger? The Quran sheds light on this aspect where Allah says; “Remind them; you are surely a reminder. You are not a

warden over them" (Quran, 88:21-24). The authority of Muhammad as the leader of the Muslim *ummah* who was also a messenger acting on trusteeship is in no doubt (Raziq, 1998). Arguably, in relation to leadership structure in Islam, Allah leads the world through the Quran (Mvumbi, 2008).Consequently, absolute leadership in Islam belongs to Allah, or to the Quran, which is a crucial part of Islamic leadership structure. As a prophet, Muhammad was regarded to be a model for the believers, and this is why his role in the pioneer Muslim *ummah* was an aspiration to be emulated. His impact on the Muslims was made easy by the Quran which warned; "Whoever disobeys God and his messenger has clearly lost the way and gone astray" (Quran, 33:36). It is such Quranic declarations that made Muhammad a defacto leader of the Muslim community (Ahmed, 1974).

The death of Muhammad saw the community in need of guidance by people who could interpret the Qur'an and find solutions to emerging problems. Accordingly, four elected caliphs succeeded Muhammad as illustrated by Sunni theology. These caliphs were forces of organization in the u*mmah*, and of the relations between man and Allah, and among humanity. The chief feature of their reign was the separation of the judiciary from the executive. It is up to the time of Caliph Abu Bakr that the caliph and his administrative officers acted as judges. Thereafter, Umar's administration separated judiciary from other departments, established courts, and appointed judges (*kadhis*) (Ahmed, 1974). In the course of Muslim history, the institution of caliphate underwent internal ramifications to ensure separation of judicial functions from the executive. In essence, we can say that Islamic leadership was working out how to live true to its leadership structure, where Allah's will as expressed in the Quran, and which is

eventually represented by the judiciary, reigned supreme alongside the caliphal leadership (see Mvumbi, 2008). While the caliphal leadership ended with the collapse of the Ottoman empire, Islamic courts headed by the *Kadhi* have been retained. Other forms of conventional leadership have emerged ranging from kings, sultans, mullahs in Afghanistan, ayatollahs in Iran, and electoral presidents among others.

Therefore, the presence of shariah courts alongside other conventional forms of leadership continue to persist and can be interpreted variously. One possible interpretation, and which is adopted by this study is to consider the leadership duality as the Muslim genius developed through many years of concerted efforts to uphold Islamic tenets as prescribed by Allah. In application, the shariah constitutes a system of duties and obligations incumbent upon Muslims by virtue of their religious belief. Literally, shariah means a path leading to the watering place, but religiously, it constitutes a divinely ordained system of conduct that guides Muslims toward a practical expression of religious conviction in this world, and the goal of divine favor in the world to come (Al-Ashmawi, 1998).The process of ascertaining the terms of shariah was completed by the end of 9^{th} century A.D thereby providing shariah with a definitive formulation. This formulation had assumed a number of legal manuals written by different jurists, which were elaborated and systematized into commentaries that have constituted the traditional textual authority of shariah (see Esposito, 2013).

The scope of shariah is comparatively wider and regulates man's relationship not only with his neighbor and state as is common with most of the secular legal systems, but also with Allah and man's own conscience (Safra, 2007). Therefore, though understood as divine law, the shariah formulations are a product of juristic interpretations. One of the

distinguishing features of Islamic law is its nature as a comprehensive code of behavior that embraces both private and public activities carried out with God in sight. Clearly, shariah takes care of both the worldly involvement, and the otherworldly concern of Muslims. It incorporates in one system a religious spirit, moral fabric, and mundane practicality (al-Ali, 1977). Arguably, when the process of interpretation and expansion of the source material was considered to be complete with the codification of the doctrines in the medieval legal manuals, shariah became a rigid and static system. Unlike secular legal systems that grow out of societal needs, and change with varying societal circumstances, shariah system is imposed on society from above. In Islamic law it is not the society that molds and fashions the law (see Esposito, 2013). It is the law that precedes and controls the human society. It is this law from Allah that is applied in the *Kadhi* courts.

The Quran is basically not a comprehensive legal code because only about eighty verses strictly deal with legal matters. During Muhammad's lifetime, he interpreted and expanded the general provisions of the Quran, and after his demise, the same situational interpretation and expansion of Qur'anic message was carried out by his successors (Safra, 2007).

The Umayyad era that succeeded the period of the orthodox caliphate produced legal developments of broader dimensions. This could be seen in the appointment of *Kadhis* to various regions together with the establishment of an organized judicial system. Though the *Kadhis* were responsible for giving fiscal laws during the Umayyad Caliphate, it is observedthat the sharp focus with which the Quranic laws were held during the Medinan period became lost. Analysts have argued that the Umayyad

Caliphate was politically successful, but failed to observe the Islamic mode of leadership as is indicated in the Quran (Kabiru, 1992).It is during the Abbassid dynasty that significant contributions to the development of Islamic jurisprudence were made through sponsoring of debates. The aim of these debates was to Islamize the law by reviewing the legal practice in the light of Quranic principles, as a result of which the legal practice was adopted, modified or rejected as part of the ideal scheme of Islam. Traditionally, the shariah was administered by the court of a single *Kadhi* who was the sole judge of facts as well as law, and whose Jurisdiction was confined to family and civil law. The *Kadhi* courts were characterized by a cumbersome system of procedure, largely self-operating and in which the pre-determined process of the law always followed automatically.

3.2 Islamic Jurisprudence and the Application of Shariah in Selected Contemporary African Countries

Islamic law, when viewed from a narrow point of view, is a body of rules with strict legal normative value, and whose compliance is enforced by an Islamic authority (Yadudu, 1993). This body of norms is enforced in public as official law in a forum called *Kadhi* court, presided over by a person known as *Kadhi.* This is a perspective in the application of Islamic law that treats shariah exclusively as positive law. There is, however, skepticism about this perspective, claiming that it conceives and treats shariah exclusively in a less comprehensive and limited scope (Yadudu, 1993).

A wider perspective of shariahhas much to do with Quranic injunctions with specific prohibition of *zina* (sexual immorality), theft and murder, among others. This perspective of shariah enjoins Muslim leaders to enforce these aspects. This view of shariah has provisions and prescriptions that demand believers to operate a society that is

fair; a society in which economic exploitations and other dehumanizing deprivations are absent, and where constant effort to check them are made (Yadudu, 1993). The enforcement of these prescriptions is put on the shoulders of individuals, as well as certain institutions like the *Kadhi*, *Imam*, among others, for the benefit of society.

Traditionally, shariah as a general legislation and public policy has operated as an institution to be enforced by an external agency, and individuals working on their conscience to ensure compliance (Yadudu, 1993). However, it would be wrong to presuppose that shariah survives mainly because of the watchful eyes of these human agencies. Even in modern times, shariah has survived in spite of the challenges confronting these human enforcement agents. This survival is attributed to sharia addressing individuals to work on their conscience to ensure compliance to its terms (Yadudu, 1993). It is in this regard that numerous appeals have been made to Muslims to do tremendous service to Islam and their community, by thinking of shariah less as a body of enforceable rules that are exclusively the preserve of the *Kadhi*, or the police. Rather, shariah should be viewed as a body of norms that address Muslims' religious duties and socio-economic situations. In this respect, shariah ought to prick the conscience of Muslims, mold their character profoundly without the necessary intervention of any external mediators, and transcend the immediate geo-political considerations (Yadudu, 1993).

Ahmed A. An Naim plies this path arguing that, the state should not claim to have the authority to enforce aspect of shariah as positive law. According to him, no principle of the shariah should be incorporated in the law of the state, because "wherever Muslims constitute the majority or even a significant minority of the population, shariah principles

will influence the law and policy of state" (An Naim, 2005). Whenever such a scenario emerges, An Naim contends, that it should be done as a matter of ordinary legislation and not in the name of shariah. Such development should not be viewed as "total banishment of Islam from the public domain" (An Naim, 2005). When interpreted in terms of shariah in the public policy,An Naim's position resonates closely with Fethullah Gülen's third way between Kuru's two extremes on state-religion-society relations as we saw in chapter two. In this way, the shariah inhabits religious and secular worlds simultaneously, and blurs conventional political lines on the hotly debated issue of state-religion-society relations (Yilmaz, 2012). "Islamic twin tolerations" as a reference coined by Ihsan Yilmazfor this mode of Islam-state engagement challenges the traditional artificially constructed binary oppositions between Islam and state (Yilmaz, 2012). This is a view that reflects Habermasian's religion in the public sphere that argues that, religions can legitimately have demands based on their background in the public sphere. However, in the final analysis, it is the legislators' epistemic task to translate the religious demands into secular language in the legislative process as observed in chapter two (Yilmaz,2012).

This mode where shariah informs public policy as a matter of ordinary legislation is communicating about a need for a shift in emphasis to personal conscience, and non-literal understanding of the operations of shariah in the public domain. This approach is necessitated by a basic dilemma presented by the modern nation state phenomenon as it is characterized by diversities, and changed circumstances. This dilemma has rendered the prevalent traditional interpretation of shariah profoundly problematic for constitutional governance, political stability, and economic development (An Na'im, 2005). Furthermore, globalization of the contemporary world has compounded the traditional

interpretation of shariah through the ever increasing prevalent interpretations, falling under the general rubric of human rights. These rights have had serious implication for shariah as public policy, and positive law (An Na'im, 2005).

From the beginning of the 20th century, the application of the shariah has broadly been confined to family law, which is not applied in the traditional manner. Throughout the Middle East, for example, the shariah family law is now expressed in form of modern codes (Safra, 2007). In most countries, the *Kadhi* court system has been reorganized to include, for instance, the provision of appellate Jurisdictions. In other countries like Egypt and Tunisia, they have abolished the *Kadhi* courts as separate entities, thereby administering the Shariah through a unified system of national courts. In many countries in the Muslim world, special codes have been enacted to regulate procedure and evidence of *Kadhi* courts, giving them much wider discretion in assessing the weight of evidence than they had under the traditional system of evidence (Safra, 2007).

Analysts have argued that some aspects of traditional family law in shariah reflected its formative environment, the patriarchal scheme of the Arabian tribal society (Safra, 2007). As a result, certain institutions and standards of the law were thought to be out of line with circumstances of Muslims in the 20th and 21st centuries, leading to countries like Turkey to abandon the shariah laws and adopt Swiss family law in 1926 (Safra, 2007).It is with this in mind that the study examines the application of the shariah,and its consequence on the contemporary state in the scheme of Islam. The examination pays close attention to the national histories, and how these have shaped the mode of contemporary application of the shariah in some selected states in Africa. The

examination lays considerable emphasis on the modes, and forms of public application of the shariah as it is conditioned by the socio-political realities, and Islam.

3.2.1 Kadhi Court in Egypt

Coping with modernity in the background of ambiguity onthe formula of integrating state and religion is a major contemporary issue facing Muslims in the world today (Esposito, 1998).Modernity among Muslims is today an internally established order that is present in the institutions of the society and the outlook of its leaders (Esposito, 1998).Most contemporary Muslim governments have tackled the ardors task of nation building by establishing states with more secular orientation and circumscribed role of religion in public life (Esposito, 1998). Today Islam is the official religion of Egypt, and a large majority of Egyptians embrace the Sunni branch of Islam (Trimingham, 1968).The exit of colonialism in Egypt consequently presented a challenge as the country grappled withthe shared aspects that could unite its people. This challenge has continued to menace Egypt as could be deduced from the number of political revolutions, the mostrecentwhich was, a civilian revolution that saw President Hosni Mubarak forced out of office in March 2011. At independence, Egypt pursued a path of political development that was heavily indebted to the west for political, legal, economic and educational institutions (Esposito, 1998).Though Egypt can be categorized as a Muslim state due to a provision that requires the head of state to be a Muslim and Islam the state religion,the country has also a prevailing post-independence tendency to limit religion to private rather than public life (Esposito, 1998). This explains why for the rulers of Egypt there was little option, but taking the unprecedented step of declaring all citizens subject to the same law, than allowing membership to quasi-autonomous self-governing religious

communities with their own legal systems (Safra, 2007). Ironically, the adoption of a uniform legal system could not replace the significance of religious communities' legal systems.

With regard to shariah as public policy and positive law, the analysis of the various Egyptian government regimes present a situationwhere shariah principles influence and permeate the law and policy of the state at public level (An-Naim, 2005). The demand for total application of shariah under an Islamic state isalways made by the Muslim brotherhood, presenting a vision of shariah more or less as positive law. The Muslim brotherhood hold the traditional position that the state under shariah should apply it as a judicial system, implying authority to enforce any aspect of shariah as positive law. A reading of the contemporary Egyptian political history informs this study that the demand for shariah as positive law comes out forcefully as a fall-back system during the crisis moments of an otherwise secular system of political governance. Or elseshariah in Egypt is diffused and operate under the uniform laws of the state thatoccasionally undergo reform to maintain relevance with changed contemporary circumstances. This can be seen in the cases of early marriages, and the woman's right to divorce. For example, Egypt enacted a code to abolish the practice of child marriage (Safra, 2007). In another reform, the political authorities (*Siyasah)* succeeded to direct as to which particular rule among the existing variant schools of law was to be applied, when the Maliki School of law was preferred over Hanafi school, because the later, unlike the former school, allowed a wife to petition for divorce on grounds of matrimonial offence by the husband (Safra, 2007).

3.2.2 Kadhi Court in Libya

Gadafi's earliest years in leadership, saw an announcement to introduce Islamic lawand establish a commission to review all Libyan laws to ensure that they were in conformity with Islam. Despite these developments, Islamic law was not fully implemented in Libya, instead the venture was replaced with a grand design denoted as the "the third universal theory." The design provided an Islamic alternative to capitalism, and Marxism for Libya, and the world as contained in the green book. The Green Book reflected Gadafi's own modern and idiosyncratic interpretation of Islam, replacing the traditional position of Islamic law as the blue print for the society. Analysts have argued that through the Green Book, "Gadafi devised an ideology and system of government based less on revelation than his own guidance and dictates" (Esposito, 1998). In Libya the status of the green book was raised to that of the shariah, interpreting Islam for state and society.

However, with regard to shariah as public policy and positive law, the aforementioned analyses of the various Egyptian government regimes equally apply to Libya. Under its democratic parliamentary appearance, problems of dictatorship and limited political space have plagued Libya (Esposito, 1998).The Green Book as expounded by the Gadafi regime has assumed the position of the shariah principles. It can be argued in this case that the green book presents a situation where shariah principles with a watered down role of the prophet influence and permeate the law, and policy of the state at public level. Otherwise, Libya like Egypt has had to contend with opposition from Muslim Brotherhood who's borne of contention has been the traditional position

that the state must apply the shariah as a legal system with authority to enforce all the aspects as positive law.

An-Naim's thesis and argument about public role of shariah in ordinary secular legislation finds relevance in the application of the shariah in the cases of Egypt and Libya (An-Naim, 2005). The two cases conform to the assertion that the prevalent traditional interpretations of shariah and its application as a legal system, is profoundly problematic for constitutional governance, political stability and economic development in contemporary Muslim societies (An-Naim, 2005). These two countries' discomfort with the Muslim brotherhood's position, does not imply that principles of shariah should not be included in state law, nor should they be implemented by state organs. The two governments' position reflect more the argument that wherever and whenever Muslims constitute majority, or even significant minority of the population, shariah principles will always influence and permeate the law and policy of the state at public level (An-Naim, 2005).

3.2.3 Kadhi Court in Nigeria

Parallels can be drawn between Islam in Nigeria and in Kenya. Both countries form part of the sub Saharan Africa with substantial part of their population made up of non-Muslims, and they are former British colonies. In Nigeria, the application of shariah as positive law has been associated with discussions about whether the state can establish judicial forums at appellate level to settle disputes using Islamic law.The first intense discussion took place between 1977 and 1978 after the military administration had promised to relinquish power to a civilian regime. In preparation to the handover, a draft constitution was submitted for public debate (Yadudu, 1993). The

1976 draft constitution of Nigeria, like the various Kenyan constitution drafts during the constitutional moment, reflected the diversity of the nation with regard to religious, cultural, and geographical differences. Public debates not different from Kenyan about the entrenchment of the Islamic laws in the Constitution ensued. In both cases, the emerging trend from the opposition to the entrenchment of Islamic law in the Constitution treated the Constitution as if it had suddenly dispensed with the consideration of the diverse differences, and imposed some uniform standard instead (Yadudu, 1993).

In the case of Nigeria, the 1976 draft constitution gave consent to the establishment of shariah court of appeal by a federal state that deemed it necessary, together with a federal shariah court of appeal. Both courts were opposed by the northern Christians in particular and southerners in general (Yadudu, 1993).Despite the opposition, the northern region has had the shariah courts of appeal for many years. The debates became intense creating tension that impeded the smooth deliberation of the Draft Constitution, leading to a stalemate. Consequently, the military intervened with a resolution that provided for the establishment of the shariah court of appeal in the Constitution (Yadudu, 1993). The Federal Shariah Court of Appeal was incorporated into the Federal Court of Appeal creating shariah division within it.

Once again, between 1988 and 1989, the debate on shariah courts ensued, after the appointment of the Constitution Review Committee (CRC) to review the 1979 Federal Constitution. The Constitution Review Committeeretained the main features of the 1979 Constitution with regard to establishment of Shariah Court with a provision that non-Muslims could opt out of the shariah jurisdiction in writing (Yadudu, 1993).The

CRC clarified on the jurisdiction of the Shariah Court of Appeal, restricting it to civil matters and in particular those that pertained to the personal status of Muslims (Nigerian Constitutional Review Commission, 1988).However, the opponents of Shariah Courts advocated for the removal of these courts from the draft constitution, arguing that the jurisdiction of the Shariah Courts be assigned to the high court of justice, adding that non-Muslims should not be compelled to bear the financial burden of courts established for Muslims (Yadudu, 1993). This argument was similar to the one advanced by the group of Churches who opposed the entrenchment of *Kadhi* courts in the Kenyan Constitution during the constitutional moment.

In response, the Muslims argued that the English common law applying in Nigeria was a Christian legal system that ought not to receive any special privileges or constitutional protection (Yadudu, 1993).This argument was equally similar to that advanced by Kenyan Muslims in the face of opposition to the entrenchment of the *Kadhi* court in the Constitution by a section of Churches. Muslim members of the Constitutional Assembly in Nigeria demanded that the High Court of justice in Nigeria ought not to enjoy constitutional protection as well, since it is Christian in origin, dispensing Christian law, and representing its values. The constitutional debates on whether to entrench or retrench the shariah courts in Nigeria ended in a stalemate calling for the military intervention through withdrawing the deliberation from the Constitutional Assembly of Nigeria (Yadudu, 1993).

In 1999 Zamfara state, one of the northern states of Nigeria began to push for the operations of the institution of shariah court at the state level of government. Today, shariah in the form of positive law has been instituted as the main body of civil

and criminal law in nine Muslim majority states, and in some parts of three Muslim plural states in Nigeria(Yadudu, 1993).The implementation of the shariah as positive law in certain states has met opposition involving non-Muslims under the growing influence of the ever expanding campaigns on human rights. The case of Amina Lawal brought to limelight the growing conflict between the shariah and the contemporary human right ventures. In 2002, Nigeria attracted negative international attention, when Amina Lawal, a single mother in Katsina state was accused of adultery, and sentenced to death by a shariah court (http://en.ikipdia.org/wiki/*sharia in nigeria*, 2011).

Benjamin Soares has observed in this regard about shariah in Nigeria that, tensions have increased not only between Muslim and Christian populations, but also among Muslim groups in Nigeria as a result of influence from outside forces. Soares points out that, "Saudi and Iranian rivalry has often played itself out in Nigeria, as both countries sought to influence and mobilize the country's often restless Muslim youth," (Soares, 2011). This mobilization has assumed the form of Islamic revival, spearheaded with increased demands for the institution of the shariah as positive law in the Nigerian judicial system.

3.3 Conclusion

Nigeria, unlike Egypt and Libya, is a Muslim plural country with a federal arrangement as the basis of the nation. The federal nationalism is built on the understanding that in coming together to form a united Nigeria, the country had chosen to organize the various diverse peoples making up the country within a framework of single state without interfering with the popular ways of each people (An-Naim, 2005). Consequently shariah courts applying Islamic laws have been instituted in most of the

dominantly Muslim, and even in some cases, the Muslim plural states. Political situation in Nigeria, especially since the re-introduction of long dormant aspects of shariah as positive law particularly in the northern states as was in Zamfara state in 1999, indicate a high degree of misunderstanding and suspicion regarding shariah as can be seen in the attraction of negative international attention, and activities from Islamists (An-Naim, 2005). Sometimes this has resulted into confrontations that have led to ugly incidences culminating to loss of life (see Soares, 2011).

This state of affair can be attributed partly to a complex web of historical and contextual factors traced to pre-independence period, and which can explain the northern Muslim and southern non-Muslim polarization of Nigeria. Part of the blame, however, is attributed to the fundamental ambiguity on the mode of shariah court as demanded by the Muslims of Northern Nigerian states that have in turn led to a vicious cycle of confrontation, and recrimination that characterize shariah debates in the country (An-Naim, 2005).

The misunderstanding surrounding the application of Islamic shariah in Nigeria is not limited to Nigeria; the same has had a spillover effect by influencing shariah debates elsewhere in Africa. For example, during the constitutional debates in Kenya a section of Christian Church maintained that the demand for the *kadhi* court entrenchment in the 2010 constitution was a Muslim ploy to turn the country into an Islamic state, a view attributed to the Abuja declaration in Nigeria (Interview with a Key Christian Informant).

In general, governments in Muslim majority countries such as Egypt and Libya examined in this chapter, tend to emphasize shariah in the mode of general public

policy, and often face opposition from the brotherhoods who in their conservativeness, in most cases emphasize and demand for shariah in the mode of positive law. However, in Muslim plural countries like Nigeria, the demand for shariah tends to emphasize it in the form of positive laws operational in the country's judicial system; the *kadhi* court.

In conclusion, it is clear from the cases of Egypt, Libya and Nigeria, that the application of shariah and its consequence on the state is not a uniform phenomenon across states, but a highly varied venture. This application and its consequence appear to approximate between shariah as positive law and as public policy as the realism of paying close attention to the national histories will sustain. In the next chapter we turn to the Kenyan constitutional history as it relates to the *Kadhi* court stipulation in the country.

CHAPTER FOUR

Constitutionalism and Ethnic Diversity as Reflected in the Kadhi Court Stipulation

4.0 Introduction

This chapter examines constitutionalism and its employment as an essential tool in the management of ethnic diversities in general. The chapter specifically examines how the Constitutional venture has been employed in the specific context of Kenya for the national integration of Muslims as an "ethnic" group. Further, the chapter analyses the *Kadhi* court operations in terms of judicial remedies to Muslims as an ethnic group in the country. The final section of the chapter turns to the nature and operations of shariah in general, and as positive laws applied in the *Kadhi* court in the judicial system of Kenya. This section pays special attention to governmental policies in Kenya whose deep historical roots in British colonial attitudes have presented real danger to all the traditional legal systems that include the shariah. The same policies are responsible for the contemporary increase in the advocacy for human rights which do not augur well for the application of certain aspects of the shariah. It is in this regard that the section examines the nature of shariah as legal statutes in contemporary Kenya, and how the statutes have been eroded continuously, and steadily.

4.1 Constitutionalism in Kenya in Various Historical Periods

The political crisis witnessed in Kenya following the December 2007 elections disclosed the existence of deep rooted and unresolved issues facing the Kenya. Indeed, while the election sparked the violence that ensued, the root cause of the conflict lay

elsewhere (Wachira, 2008). Out of the issues raised, ethnicity was at the center of the debates and conflict. Various commentators figured out the emotive subject of historical injustices as they related to the ethnic issue (Wachira, 2008).In the contemporary world, ethnic mobilization has emerged as one of the aspects that defy the fundamental concepts on which the modern nation state has been built. Consequently, ethnic mobility has come to present a formidable challenge to policy makers and nation building (2008). Ethnicity in the context of Kenya is more visible as it functions along tribal lines where it provides a sense of belonging that is attached to a common tribal root. In general application, ethnicity is often employed in many commentaries in terms of ethnic relations without any further qualification (Kinyanjui and Maina, 2008). Eriksen has defined ethnicity as:

> An aspect of social relationship between agents who consider themselves as culturally distinctive from members of other groups with whom they have a minimum regular interaction...thus also...defined as a social identity (Eriksen, 1993).

This study submits that ethnicity is a multi-dimensional phenomenon that can be construed in terms of religious grouping, apart from tribal community. In this respect it is possible to discuss religious ethnicity among others.

Ethnic conflicts such as in the threats by Kenyan Somalis and Arab Muslims to secede from the country, and in which religious complicity alongside other issues could not be ruled out, are often the expression of underlying social and political conflicts between the population segments, or interest groups within the wider society (Ndzovu, 2009). The mobilization of ethnicity as in the cases of Somali and Arab Muslims is

simply a form of politics; a form that tends to increase and harden divisions by questioning the basis of the nation state itself. The Somali and Arab Muslim cases are a testimony to the strength and resilience of ethnic identities as fundamental expression of human solidarity and social integration.

The prospects of peace and war, maintenance of national unity, and enjoyment of fundamental human rights in many parts of the world depend on adequate solutions to ethnic tensions (Wachira, 2008). The tensions are addressed in the modern nation state in the accommodation of ethnic diversity through the basis of human right standards, and principles of constitutionalism. Constitutionalism is conceived as a phenomenon that envisions a government limited by the law for the sake of liberty of the individual, and the realization of human rights (de Smith, 1964). It employs doctrines and practices that form the fundamental organizing principles of the state. Aristotle is widely acknowledged as one of the pioneer proponent of the idea of constitution. According to Aristotle, constitutional government is one that citizens of every class are enabled to enjoy their respective privileges, and encouraged to exercise their respective responsibilities in the interest of the whole (Safra, 2002).

The modern idea of constitutionalism emerged after the reformation period as demonstrated in the idea of social contract found in the works of John Locke, Thomas Hobbes, and Jean Jacques Rousseau's idea of social contract. In this idea, people agree among themselves to give up their respective absolute freedoms in return for security that an acknowledged sovereign government can provide (Safra, 2002). Locke in particular had great influence with regard to the division of rights between those assigned to the

government and those retained (de Smith, 1964). De Smith combines all these views arguing;

> The idea of constitutionalism involves the proposition that the exercise of government power shall be bound by rules prescribing the procedure according to which legislative and executive acts are to be performed and delimiting their permissible content (de Smith, 1964).

In this sense constitutionalism checks the power of the government, securing peace, national unity and enjoyment of rights by becoming a living reality to the extent that these rules curb arbitrariness of discretion, and are observed by the wielders of political power, and to the extent that within the forbidden zones upon which authority may not trespass, there is significant room for the enjoyment of individual liberty (de Smith, 1964).

The Kenya state has grappled with the challenge of managing diversities since independence in 1963, often with limited success. The major test in the constitutional management of diversity is the ethnic factor both in the tribal as well as religious forms. The formation of the first republic through the fusion of the Kenya colony and the coastal strip Protectorate presented one of the earliest efforts in the management of diversity through constitutionalism. In terms of religious traditions, ethnic diversity under the constitutional management included the indigenous ethnic religious traditions comprising of diverse tribal communities in Kenya, the extended missionary religions of Islam and Christianity, and the migrant ethnic religions comprising of Hinduism, Judaism, Buddhism, and Taoism (Ogutu, 1990). The privileged position of the Sultan of Oman and

that of the colonial powers during the initial constitutional moment that delivered the Independence Constitution in Kenya saw their respective religious interests assume the center stage. Consequently, the *Kadhi* court became a feature of the independent Constitution of Kenya.

The Committee of Experts on Constitutional Review in Kenya contextualized the history of constitution making in three landmark periods, that defined constitutional developments moments as follows (Committee of Experts on Constitutional Review, 2009):

a) Pre-colonial period from 1887 to 1920.

b) Colonial period from 1920 to 1963.

c) Independence and post-independence period from 1963 to 1992.

Kenya's earliest constitutional foundation was laid in 1887, when an agreement was reached between the Imperial British East Africa Company and the Sultan of Zanzibar, granting the Imperial British East Africa Company a fifty-year lease over the Coastal strip. In 1890 the lease was converted to a concession under which the Imperial British East Africa Company acquired the power to administer the territory by appointing commissioners administering districts, making laws, operating courts, and acquiring and regulating land. In 1895, the administration of the territory changed hands from the Imperial British East Africa Company to the British government and the constitutional status of the Kenya coast changed formally to a Protectorate in 1897. The East Africa Order in Council of 1897 provided the constitutional instrument by which the protectorate was governed, and increased the powers of the Commissioners. It also proclaimed the application of the English Common Law and the establishment of a

judicial system in Kenya (Ndzovu, 2009).Behind the façade that entailed the imposition of western legal traditions was the tacit articulation of foreign values, traditions, cultures, and religions.

In 1920, the Protectorate status of the mainland territory of Kenya (excluding the coastal strip) changed to colonial status and the inhabitants became "British subjects" instead of British protected persons (Ndzovu, 2009). The colonies constitutional arrangements were initially set out in the Letters Patent and Royal Instructions of 1920 (Ndzovu, 2009). As African political resistance to direct British rule grew, major constitutional changes were attempted. For instance, the Littleton and Lennox-Boyd Constitutions of 1954 and 1958 were aimed at bringing an end to racism, but the changes they introduced were rejected. Consequently, the Lancaster House Constitutional Conference was convened in 1960 in which Kenya's independence constitutional settlement was agreed paving the way to independence in 1963 (Committee of Experts on Constitutional Review, 2009).

The independence Constitution of Kenya of 1963 established a parliamentary system of government with a parliament consisting of the National Assembly and the Senate. It also had a provision for a Prime Minister and a cabinet drawn from parliament, which depended on the support of the national assembly to remain in power. Further, the Independence Constitution adopted a devolved system of government, but because the constitutional settlement was reached at Lancaster House, there was a political undercurrent suggesting that the Constitution was not home grown, and Kenyans did not have ownership to the Constitution (Bartos and Wehr, 2002).

In 1964, the first post-independence government successfully introduced amendments to the Constitution changing it fundamentally; where the parliamentary system of government was converted to a predominantly presidential one. The following year, the system of devolution was largely dismantled in an amendment backdated to independence. Gradual amendments to the Constitution between 1964 and 1982 increasingly concentrated power in the office of the President (Ongaro and Ambani, 2002). The cumulative effect of these amendments undermined democracy, eroded the idea of limited government, and removed from the Independence Constitution the important principle of checks and balances, which is the hallmark of constitutionalism. An imperial presidency emerged as the positions of the Head of State and Head of Government were unified, without the attendant checks that exist in a presidential system that respects principles of constitutionalism (Committee of Experts on Constitutional Review, 2009). Constitutional protection against redrawing regional and district boundaries or creating new regions or districts was removed, as were limitations on powers to declare a state of emergency. The requirement that members of parliament who defected or started a new party had to seek a fresh mandate from their constituents was put in place. The Senate was abolished altogether and the President acquired the power to appoint twelve members of parliament.

In 1982, Kenya was transformed into a *de jure* one party state, through the introduction of section 2A to the Constitution and what little semblance of multi-party democracy that had appeared to exist disappeared. These developments damaged the country's constitutional development profoundly (Committee of Experts on Constitutional Review, 2009). It is the position of this study that the damage on Kenya's

Independence Constitution had the potential to undermine the ethnic integration, which is the basis of the country's national unity. Expected in this respect is the mobilization of ethnicity either in the religious or tribal dimensions, as a form of counter politics, since ethnicity has the potential to become a powerful political instrument.

At Kenya's independence in 1963, one fundamental problem that the young state faced was how to address the demands of its diverse constituent communities. The problem arose due to the state's arbitrarily contrived colonial origin and structures (Dersso, 2008).What made the problem particularly formidable was that Kenya as a product of colonial adventurism in state making, lacked national cohesion. Many African countries were constituted through amalgamation of various ethno-political communities of different histories, political traditions, and cultures (Dersso, 2008).

Independent African governments often had two options in their endeavor to nation building that included the concept of nation-state and multi-cultural model (Dersso, 2008). The multi-cultural model recognizes the reality of the various ethno-political communities that make up the state and instutionalise mechanisms to accommodate their respective interests. The nation-state model of nation building on the other hand:

> …tends to ignore, or even combat expressions of ethnic identity with its strong assimilationist features emphasizing national unity…Central to the nation-state model is the idea that there is to be coincidence between the nation as culturally and linguistically homogeneous entity and the state… Accordingly the dominant view of the 20th century has been that a state should have a homogenous national identity (Dersso, 2008).

This study elaborates the nation-state model in length because it was the model assumed by the Kenyan state .The inclusion of *Kadhi* court in the Independence Constitution therefore presented diversity in a country that had chosen unity as represented by a homogenous national identity. History of *Kadhi* courts in Kenya can confirm whether the inclusion of *Kadhi* courts in the Independence Constitution was for the genuine sake of the Muslims as a constituent entity of the country or whether it was for territorial amalgamation of coastal strip in the Kenyan state. This issue is addressed in the last section of this chapter.

Religio-political conflict surrounding the *Kadhi* court during the constitutional review is mainly a product of the failure of post-colonial African states to recognize diversity, and develop the necessary institutions and policies for accommodating the interests and identity of members of various groups. According to Gidon Gottlieb the view that every state should be one nation is pernicious, (see Parekh, 2011). This position is supported by Adam Roberts who argues that, no state is undifferentiated monolithic whole, and that most modern societies are socially, culturally, sexually, religiously, and ethnically heterogeneous (Parekh, 2011).These views on diversity support the creation of *kadhi* court. Otherwise, how then do you define national identity in a culturally plural society like Kenya? Bhikhu Parekh informs this question when he notes that national identity cannot be culturally, and ethnically neutral, for such arrangement eventually satisfy no one, and would lack the power to evoke deep historical memories. Neither should national identity be biased toward one particular community, while it delegitimizes, and alienates others. Nevertheless, establishing acceptable national identity

in plural societies is a tricky undertaking, and each community has to strike its own balance. If there is to be national cohesion, it is essential that minority communities must be active participants in the social and political life of the society by being integral to its self-definitions (Parekh, 2011).

The Independence Constitution as it grappled with diversity, declared that religion and state shall be separate. This declaration finds two possible interpretations. First, it recognizes that Kenya is a plural society and the separation would enhance accommodation of diversity and ensure freedom to constituent communities of the nation. This interpretation cannot be used to delegitimize the *Kadhi* courts; rather it is the diverse Kenyan cultural communities including Muslims that should determine the meaning and scope of the state-religion separation. This type of religion and state separation represents passive state secularism which often tolerates public visibility of religion in the state.

The second interpretation of the separation of state and religion is the view that the state determines the direction of the nation, thereby, religion should not interfere with the affairs of the state. This interpretation often aims at protecting the state from religious interference. As the rationale used to oppose the entrenchment of the *Kadhi* court during the constitutional review moment, this approach suffers from tunnel-vision (narrowness). State–religion public policy as expressed in this manner represents assertive state secularism hostile to public visibility of religion in the state, and which often only finds justification in a conflictual ideological juncture, involving religion in the history of the nation. Based on nationalism point of view, the demand by Kenyan Muslims for the entrenchment of *Kadhi* court in the Constitution reflected efforts on their part as a minority, to be integral part of Kenya's self-definition in modern times. This position

finds support from Ahmednassir Abdullahi who saw the opposition of *Kadhi* courts as a situation that may force Muslims to regard themselves as different from the rest in the country (Abdullahi, 2010).

4.2 The Kadhi Courts in the Independence Constitution and Judicial Remedies

The Independence Constitution provided for *Kadhi* court for the application of Islamic law on matters of personal status, marriage, divorce and inheritance in proceedings in which all the parties professed the Muslim religion. Section 66 of the Independence Constitution provided for the office of the Chief *Kadhi* and such number of other *Kadhi*s, not being less than three as may have been prescribed by the Law. Sub-Section 3 of Section 66 provided for the establishment of subordinate courts held by *Kadhi* as parliament may have had to prescribe. The jurisdiction of the Chief *Kadhi* and the other *Kadhis* was to apply within the former Kenyan Protectorate and had to extend to the determination of questions of Muslim law relating to personal law in cases involving Muslims. The Chief *Kadhi* and *Kadhis* were to be appointed by the Judicial Service Commission. The qualification for appointment was professing the Islamic faith and possessing such knowledge of the Muslim law applicable to any sect of Islam as was satisfactory to the Judicial Service Commission.

The constitutional status of *Kadhi* court was based on a treaty in which the British, Kenya and Zanzibar governments were parties in 1963. According to the treaty, the Sultan of Zanzibar agreed to cede his sovereignty over the coastal strip to Kenya. On its part, the Kenya government undertook to implement various measures for the protection of the interests of the former subjects of the Sultan, among them the Islamic personal law (see Committee of Experts on Constitutional Review, 2010).The

aforementioned agreement is hereby laid down in summary. On 14th June 1890, an agreement was made on behalf of Her Majesty Queen Victoria with His Highness Sultan Seyyid Ali bin Said that His Highness' dominions should be placed under her Majesty's protection. By a further agreement made on behalf of Her Majesty Queen Victoria on 14th December 1895, with His Highness Sultan Seyyid Hamed bin Thwain, it was agreed that His Highness' possessions on the mainland of Africa and the adjacent islands, exclusive of Zanzibar and Pemba should be administered by officers appointed directly by Her Majesty's Government and those territories would be administered as part of Kenya under the name of the Kenya Protectorate (Committee of Experts on Constitutional Review, 2010).

An Order in Council of 1897 allowed application of Islamic law in the coastal strip, but Article 55 of the 1897 Order in Council restricted Islamic law to civil matters of marriage, divorce and succession in the Kenya colony (Ndzovu, 2009). This effectively provided the foundation for the jurisdiction of the *Kadhi* courts in settling disputes among Muslims in matters of marriage, divorce and succession. At the same time, the Order in Council of 1897 provided for the application of common law in Kenya. After the mainland territory of Kenya became a colony, by contrast, the coastal strip still on lease from the Sultan of Zanzibar was renamed the Protectorate of Kenya. This implied that the coastal strip was a separate legal entity with Protectorate status and its residents were considered "British protected persons" rather than "British subjects" (Ndzovu, 2009).

At the outset of British rule in 1895, *Kadhis* at the Kenya coast assumed what some observers have termed as anomalous role in the new judicial system. The Protectorate agreement that established British rule over the 10-mile coastal strip from

Vanga in the south to Kipini in the north, affirmed the Zanzibari Sultan's influence in the region, recognized the authority of Islamic judges and guaranteed that the shariah would be maintained (Brown, 1993).

This status continued until independence. At the start of the Lancaster House constitutional talks in 1961, the status and fate of the coastal strip came up for determination. The difference in status between mainland Kenya as a British colony, and the coastal strip as a British Protectorate was emphasized as the colonial administration organized separate talks for the delegates from the colony and the Kenya coast. Sir James Robertson, formerly Governor-General of Nigeria, was mandated to recommend to the British government and to the Sultan of Zanzibar what changes should be made in the 1895 agreement concerning the coastal strip (Hassan, 2002). He recommended that despite the different status of the coast, it had been governed for a long time as part of Kenya and should therefore be integrated into mainland Kenya. It was agreed that the Sultan would receive suitable compensation and the following guarantees were to be enshrined in the Constitution (Hassan, 2002):

a) A declaration of human rights including freedom of worship.

b) Safeguards for the retention of *Kadhi* Court.

c) Arrangement for future appointment of Muslims as administrative officers for Muslim dominated areas.

Consequently, on 8th October 1963, the British governments, Zanzibar, and Kenya, signed an agreement, whereby, the Sultan relinquished his claim of sovereignty over the Kenya coast. As part of the independence agreement, Prime Minister Jomo Kenyatta and the Prime Minister of Zanzibar Mohamed Shamte, on behalf of the Sultan

of Zanzibar, exchanged letters stipulating the terms of integrating the coastal strip to Kenya(Hassan, 2002). Kenyatta made written undertakings in the letters of exchange that contained the agreement. With respect to the *Kadhi* court, the undertaking was: The jurisdiction of the Chief *Kadhi* and of all the other *Kadhis* will at all times be preserved and will extend to the determination of questions of Muslim law relating to personal status (see Hassan, 2002). On the basis of this and other guarantees, the Sultan made an undertaking to waive all his authority over the coastal strip. By virtue of the independence agreement involving the three governments, the *Kadhi* court was entrenched in the Independence Constitution (Committee of Experts on Constitutional Review, 2010).

After independence in 1963, the legal reform in Kenya achieved a major restructuring of the judicial system through the unification of the courts by abolishing the separate hierarchy of courts as inherited from the colonialists. The restructuring was driven by different motivation for the Muslim community and the rest of the segment of the population in Kenya. The Muslim community was striving to obtain special safeguards for the continued existence of the *Kadhi* court, while the other communities, particularly Africans, aimed to use the restructuring to end racial discrimination in the colonial legal system. The resultant unified court system in Kenya continued to recognize the special standing of Islamic law despite the circumscription of the same laws to questions of personal status (Ghai and McAuslan, 1970).

The *Kadhi* Courts Act of 1967 formally established the six Muslim courts in Mombasa, Malindi, Lamu, Nairobi, Kisumu, and Garissa. The courts have subsequently been increased, and by 2010 there were fifteen *Kadhi* courts in Kenya (Brown, 1993).

These were spread throughout the country according to the Muslim distribution and concentration as follows: Mombasa, Lamu, Garissa, Marsabit, Bungoma, Kisumu, Isiolo, Wajir, Eldoret, Nakuru, Nairobi, Nyeri, Kwale, Hola, and Malindi. In the last section of this chapter, we examine the declining official status of the *Kadhi* court in Kenya under the onslaught of various factors. The decline in official status has taken place over the last twenty-five years; a time also marked by accelerated social and economic changes that in their wake have generated even greater need for judicial remedies, due to increased conflicts over family and property rights (Brown, 1993). As a consequence, the work load of the *Kadhi* court has increased significantly. Throughout those years, most cases have involved marital disputes that touch on issues like absentee husbands, run-away wives, irresponsible fathers who cannot provide for their families, and husbands who fail to pay maintenance fee to their divorced wives (Brown, 1993).

In Mombasa for example, the cases taken to the *Kadhi* court had increased from forty-five in 1958, to two hundred and eighteen in 1982 (Brown, 1993). During that time period the population of Mombasa had risen from 150,000 to over 450,000 people (Brown, 1993). Statistics also show that there was an important occurrence in form of a shift in the type of suits and the identities of the plaintiffs. For example, cases initiated by women in Mombasa increased from eighteen in 1958 to one hundred and ninety in 1982 (Brown, 1993). This represented a leap from forty percent of the *kadhi* court cases in1958, to eighty seven percent of the total cases in 1982 (Brown, 1993). In contrast, male initiated cases in Mombasa increased from twenty five in 1958, to twenty eight in 1982, representing a percentage decrease from fifty six percent, to less than thirteen percent of the total cases between 1958 and 1982 (Brown, 1993).

Susan Hirsch has also provided statistics to show that the number of cases filed in *Kadhi* court in Mombasa and Malindi have increased since the 1970s and that in Malindi, the number of divorces registered for 1985 and 1986 exceeded the number of marriages (Hirsch, 1998). Out of the one hundred and twenty nine legal claims filed in a twenty-month period in Malindi from 1985,women brought one hundred and eight, while men brought a mere seventeen. Ninety three of the claims brought by women were for failure of the men to provide economic support of one kind or another. Women won 42.5% of their cases, settled 39.8%, and lost only 1.9%, with 14.8 % unresolved. Men, on the other hand, won 23.5%, settled 35.3%, and lost 29.4% of their cases, with 11.8% unresolved. Furthermore, most of the cases won by women resulted in awards of maintenance and/or dissolution of marriage (Hirsch, 1998).

The increasing dominance of the *Kadhi* court by women has been interpreted variously. Susan Hirsch in this regard cautions against reading Muslim women's increasingly successful use of the *Kadhi* court as entailing resistance to male domination. She argues rather that Muslim women engage in acts of faith by petitioning *Kadhi* court. They are demonstrating their faithfulness to their religion, while perhaps trying to change their circumstances with regard to individual men. Hirsch demonstrates that women in making their claims constitute themselves as gendered subjects through the narratives they tell in court (Hirsch, 1998).These narratives are gendered because mostly women engage in gendered linguistic form. Women often refer to themselves in these narratives as having complied with Islamic law through having persevered. The idea suggests that whereas men are to maintain women and exercise control over them, the women, who are being maintained, are to persevere. Hirsch nonetheless concedes that the accumulation of

successfully pursued cases by women may in the long term have some transformative effects with regard to gender issues (Hirsch, 1998).

Analysts have also recently observed an increasing number of Muslim women bringing cases to *Kadhi* court and winning (see Mutua, 2006).Due to this trend, the courts are generally perceived as women's courts, particularly at the coast of Kenya where a large portion of the Muslim community lives. Arguably, these courts have provided an opportunity for women to make their voices heard and enforcing favorable Islamic provisions, particularly regarding family maintenance.

In contrast to Hirsch view, the Constitution of Kenya Review Commission (CKRC) noted that the description of the *Kadhi* court from the collated views suggested that the court is a site for women's resistance to patriarchal conditions. Muslim women located these conditions in negative cultural practices and customs, presuming that Islamic law provides a remedy for them. Whether many of these patriarchal conditions rest only in pre-existing cultural practices and not in mainstream interpretations of Islam is debatable.

In 2011, the Chief Justice (CJ) of Kenya Dr. Willy Mutunga rekindled the issue of women and *Kadhi* court in a manner that was a kin to resistance to male domination when he contemplated appointing the first female *Kadhi (see* Amran and Benyawa, 2011). This view was supported by the Chief *Kadhi* of Kenya Muhdhar Ahmed, asserting that, the *Kadhi'*s responsibility is to follow the Islamic law when performing their duties. The chief *Kadhi* added that, the jurisdiction of a *Kadhi* is restricted to matters of personal status, which could easily be performed by a woman *Kadhi*. This was confirmed through interview with Director of Religious Affairs –

Supreme Council of Kenyan Muslims (SUPKEM), on 5th September 2013 (Amran and Benyawa, 2011). However, the subject has drawn sharp opposition from sections of Muslim leadership. The Chairman of the National Muslim Leaders' Forum (NAMLEF) Abdullahi Abdi maintained that the *Kadhi* court is a religious institution which requires being respected (see Amran and Benyawa, 2011, also confirmed through interview with Director of Religious Affairs –Supreme Council of Kenyan Muslims (SUPKEM), on 5th September 2013). This position was similar to that of the Secretary General of Council of Imams and Preachers of Kenya (CIPK) Sheikh Mohammed Dor. Dor maintained that *Kadhi* courts "are religious Muslim courts that are guided by the teachings of the Quran" and as a result they "should not be altered by anyone" (again confirmed through interview with director of religious affairs –SUPKEM, on 5th September 2013). In support of his colleagues, the Director General of the Supreme Council of Kenya Muslims (SUPKEM) Abdulatif Shaban posited that "there are some Islamic rituals that are conducted in the Mosque by men only" and that over lordship in a court is one of male duties (Amran and Benyawa, 2011, also confirmed in an interview with director of religious affairs –SUPKEM, on 5th September 2013).

Clearly, from the foregoing statistics and discussion, there is an increasing need for the *Kadhi* court's judicial remedies as is supported by the court's increasing demand and supportive datain Kenya. There is a strong indication of dramatic increase and reversal of women's roles in the *Kadhi* court, where they are increasingly predominating as plaintiffs. Arguably, from a constitutional perspective, the constitutional review moment for the 2010 Constitution provided an opportunity for the re-orientation of the operations of *Kadhi* courts with contemporary situations. The reversal of plaintiff roles

with regard to remedial operations of the *Kadhi* court had a significant bearing on the CKRC's recommendation to incorporate a female representation in the operations of the *Kadhi* courts.

4.3 Independence Constitution, Kadhi Court and Integration of Muslims in Kenya.

In theory, national state constitutions often aim at shaping the population within the state boundaries into a single polity where membership is acquired through citizenship of the state. For Kenya, the national venture implied that the diverse ethnic groups and their peculiar cultural backgrounds had to adjust into the Kenyan national identity. Hassan Ndzovu has analyzed in this regard that the rise of the Kenyan nation as the prevalent form of collectivity with which people had to identify has been a successful nationalist venture. He qualifies this observation, arguing that this is despite Kenyan Muslims' awareness that they shared a common religion with many other people in the Middle East and other parts of the world (Ndzovu, 2009). This study corroborated Ndzovu's position, when it established that with regard to Kenya, the bond of the nation was stronger than the bond of religious ethnicity. Both Muslim and Christian informants in this study identified primarily as Kenyans first, and only in the secondary did they cite their various religious identities. Apart from this apparently smooth broad picture of the Muslim integration in the Kenya nation, the process has however not always been smooth.

While analyzing the integration of Muslims as a religious ethnic group in Kenya during the colonial era, Salim has asserted that colonialists divided Muslims along racial lines, successfully affecting their economic mainstay. Furthermore, the establishment of colonial structures, and the nationalist efforts saw the transformation of the political

system into a secular system, where the basis of political legitimacy was without any religious basis (Salim, 1972). Nevertheless, religion was still a relevant factor in the politics of Kenya (see Ndzovu, 2009). Post-colonial Kenya was not to be free from the shadow of colonialism as a result of which the Independence Constitution proved not to be a panacea of ethnic divisions. President Jomo Kenyatta is quoted in this reference:

> The Republic is the people of Kenya. All through the colonial days, for the purpose of divide and rule, we were constantly reminded that we were Kikuyu, Wakamba, or Kipsigis, or Maasai, or English, or Hindu, or Somali (Kenyatta, 1968).

The negative end had been achieved through the colonial policies such as arbitrary creation of boundaries, and little regard for the colonized people's political arrangements, all of which ensured that civil conflict would occur in the new states (Bartos and Wehr, 2002). Many amendments were made on the Independence Constitution under the presidential reigns of Jomo Kenyatta and Daniel Moi. President Kenyatta justified the amendments by claiming that the amendments under him embodied features of equality and respect that cut through any differences of race or tribe (Kenyatta, 1968).

There is, however, an alternative view about the constitutional amendments under the reign of both Presidents Kenyatta, and Moi. This view has maintained that the aforementioned amendments did not effectively uphold constitutionalism. The presidency was accused of amassing enormous powers used to exert ethnic dominance in favor of the incumbent president's ethnic community (Ongaro and Ambani, 2008). The result of this has been the ethnic prone politics that affect not only who is elected, but also how the

jobs are allocated, how scholarships and bursaries are awarded and effected (Ongaro and Ambani, 2008). Ali Mazrui captures this situation as; "the triumph of ethnic nepotism as one branch of corruption" (Mazrui, 2004). The pervasive power of ethnicity has had far reaching influence as can be seen in areas of power plays, capital transfers, loyalties and solidarities, and even in loans and gifts.

Report by the Society for International Development (SID) on Kenya corroborates ethnic nepotism statistically as follows:

> It emerges that informal and formal employment in Kenya tends to be concentrated in a few provinces. These are Nairobi, Rift Valley and Central, which jointly account for about 60% of the total employment even though they account for a total of 45% of Kenya's total population (Society for International Development, 2004).

Ethnicity has confounded Kenya's governance structures that it ranks top on the list of challenges of state, especially in the tribal rather than religious forms. Even though religious ethnicity is less obvious in the Kenyan state management, its evidence is nonetheless glaring in the case of Muslims. Ndzovu has concluded in regard to post-colonial Kenya that, there seemed to be a ploy that saw the incorporation of a few Muslims as symbolic figureheads to give the impression of political inclusion at the highest level of governance. In reality, however, most influential positions were held by upcountry Christian professionals (Ndzovu, 2009). Mazrui alludes to support of the dominated conditions of Muslims in Kenya, and refers to it as internal colonization (see Mazrui, 2004).

The current study holds that there is a relationship between the dominated status of Muslims in Kenya and the re-emergence of secession agenda since the early 1990s. The earliest versions of the re-emergence could be deduced from the sometimes unpopular debates on *majimbo* (federal system of government). It is noted that *majimbo* was the rallying call for the Muslim dominated coastal region during the nationalist efforts of the independence period. At the time of writing this thesis in 2011, there was a secession attempt with regard to the coastal-strip, by a group calling itself the Mombasa Republican Council (Nation TV, 2011).

During the colonial era, secession attempts were made by the Arab and Somali Muslims. Several reasons have been cited as informing these attempts, among them the fear of being dominated by the upcountry people. The main lesson this study draws from the pre-independence demands at secession is that behind the attempts was often a convergence of many causal factors. This study, while not ignoring the possibility of other factors at play, attributes the contemporary secession agenda partly to the marginalization of Muslims as an ethnic group (see alsoNation TV, 2011). The study further maintains that, the marginalization was largely the product of the anti-constitutionalism of the changes in the Independence Constitution. This position is supported by the premise that modern national state loyalty lacks the ability to supplant ethnic loyalty. National state loyalty has to be built on top of ethnic loyalty by creating a national state system in which all ethnic groups are able to express themselves (Lewis, 1965). It follows that although Kenya has both the shared values and an inspiring history, which are important ingredients to the sustenance of a multi-ethnic state, Muslims in

Kenya can only share in the allegiance to the larger polity if they see it as the context at which their ethnic identity is nurtured rather than subordinated (Kymlicka, 1995).

A constitution that embraces the principles of constitutionalism has the ability to integrate the diverse ethnic groups into a single polity, and the reverse is also the case when the same principles are not upheld. Ethnicity as a major challenge to the Kenya nation is informing about constitutionalism of the Independence Constitution. Mazrui has recounted the Kenyan post-independence ethnic predicament in the following way:

> One major characteristic of politics in post-colonial Africa is that they are ethnic prone. My favourite illustration from Kenya's post-colonial history was Oginga Odinga's efforts to convince Kenyans that they had not yet achieved Uhuru but were being taken for a ride by corrupt elite and their foreign backers. Oginga Odinga called upon all underprivileged Kenyans regardless of their ethnic communities to follow him towards a more just society. When Oginga Odinga looked to see who was following him, it was not all underprivileged Kenyans regardless of ethnic group, but fellow Luo regardless of social class. It was not the song of social justice which attracted his followers; it was who the singer was – a distinguished Luo. Not the message, but the messenger (Mazrui, 2004).

Building on Mazrui's assertion, for the majority of Kenyan Muslims, the anti-constitutionalism of the Independence Constitution presented double jeopardy because it translated into ethnical marginalization at the dual levels of tribe and religion. Constitutional review moment can then be viewed as presenting the opportunity to

address the issue of marginalization among the Muslim ethnic group. It could be argued that the demand for *Kadhi* court, among other aspects, represented symbolic yearning for the redress of the historical injustices to the Muslims as an ethnic group in Kenya. The Chairman of the Kenya Muslims Advisory Council Juma Ngao said as much when he urged the Muslims to vote for the 2010 Constitution. He clarified about the issue under the vote as not Muslims versus Christians, but rather about those who wanted national reforms through the Constitution and those who resisted these reforms (waamo news.com, 2010).

4.4 Diminution of the *Kadhi* Court in the Independent Constitution

As positive law to be enacted and enforced by the state in the *Kadhi* court, shariah has faced steady diminution both in jurisdiction and status in the contemporary society due to the basic dilemma of diversity and modernity. This dilemma has been compounded by both internal and external factors. Internally, the nature of shariah "precludes its enforcement by the state as positive law and public policy," because "the religious commitment of Muslims" makes the relegation of the shariah "to the "private domain" neither viable nor desirable (see An Naim, 2005).

John Osogo Ambani in unpublished article, "The Tragic African Traditionalists in Kenya: Case of Subtle Usurpations of Religious and Cultural Rights," corroborates the external factors, when he argued with regard to the Kenyan legal system. He asserts that:

> Apart from the Christian faith and values related to it, any other religion or custom is certain to find the Kenyan legal system not very hospitable. Religious and cultural traditions not analogous to Christianity, or English

> common law stand to face stiff opposition and obstructions, firstly from the Constitution itself, then general acts of parliament and judicial precedents, western traditions, and even international human rights instruments to which Kenya is a party (Ambani, 2010).

Ambani's study is in reference to African customary law, that like, Islam is traditional custom, morality and religion. Brown supports Ambani's views on the hostility of the Kenyan legal system to traditional customs with reference to Islamic law. Brown has observed that since the 1950s, the jurisdiction of Islamic law in Kenya has narrowed steadily due to British colonial attitudes, historical consciousness, and political struggles of the nation's dominant ethnic groups (Brown, 1993). Denotation of African customs and Islamic institutions with a typical western vocabulary such as "religion" is confusing. Religion in Islamic and African context is deeply rooted in culture and this is why in both cases, religion could be considered in totality of human life, in which nothing falls outside the realm of religion.

The conceptual meaning of religion in the context of a nation's compositional diversity presents overlaps that account for the varieties of religion-state conceptions found in the contemporary constitutional arrangements, and legal practices in Africa. It is because of this that the declaration of separation of state and religion should be understood variously in different nations. Consequently, when evaluating the relationship between religion and state in the African context, and Kenya in particular, one should not be misled by constitutional rhetoric. Clearly, religion is still important as a moral force,

and has not lost its place in Kenya's politics and elsewhere in the world (Vyver and Green, 2008).

The importance of religion to human beings is today being upheld at the international level because of its ability in promoting moral values and enhancing human conditions within the political society. This explains why religion as an entitlement has quickly become amenable to human rights articulation at the United Nation (UN) level. It is against this background that the right to religion has become a subject of a number of international instruments (Vyver and Green, 2008). One significant international instrument was the Universal Declaration of Human Rights (UDHR) of 1948, which included within the scope of the right of a person, the freedom of religion or belief. This freedom of religion is stipulated:

> The right to freedom of thought, conscience and religion, this includes freedom to change his religion or belief, and freedom either alone or in community with others and in public or in private, to manifest his religion, or belief in teaching, practice, worship and observance (see Vyver and Green, 2008).

According to Ambani, even though these proclamations imply that there is no distinction between Universal Declaration on Human Rights (UDHR), and the freedom of religion and belief, to the contrary this is not the case. The distinction has not ensured harmony just as the fact of being embodied in the (UDHR) could otherwise imply, since the declaration of the right, just like the freedom of religion instrument, has attained hallowed international law status'' (Ambani, 2010).

Another important international instrument is the International Covenant on Civil and Political rights (CCPR) of 1966, which stipulated the freedom to adopt a religion or belief of one's choice (see Article 18, Universal Declaration Human Rights). It is necessary to bestow this right and freedom upon an individual, because to change, adopt, or have a religion is in each instance qualified by ones choice (see Article 18, Universal Declaration Human Rights). Clearly, the human rights articulation under the UN emphasizes that "no person shall be subject to coercion which would impair his freedom to have, to adopt, and to change a religion or belief of his choice'' (see Article 18, Universal Declaration Human Rights).

At the regional level, the African Charter on Human and People's Right to which Kenya is party, provides for freedom to exercise ones religion without restrictions beyond the law. This on the face value is positive news for all religions, Islam included, as mandated under the international law on human rights. Based on the provision in the international law, shariah could also be regarded as human right for Muslims living in any part of the world. This right manifests itself through various practices that are performed in specific times, including moments of birth, marriage, death, divorce, succession, crime, and sin among others (Ambani, 2010).

It is, however, noted that as much as the modern world advocates for freedom to exercise religion, and by extension, to observe shariah, this study highlights that the said advocacy lays more emphasis on authority based on the human dimension as human right, and not as much as in recognition of the authority of the ultimate of religion. In other words, it is ironical that though freedom to shariah among Muslims is recognizable as a human right, the ultimate of Islam itself is not the basis of this recognition. This

reflects the earlier observation in chapter two about secularism, and its emphasis on man and nature, at the expense of a beyond. In this way, the adjudication of shariah as positive law before a modern *Kadhi* court fashioned on western constitutional ideals, and advocated for by human rights end, has the potential to rob shariah of its inert character, which is its very essence.

Another drawback to the freedom of religion and the application of shariah by consequence is the content of the same human rights on some specific issues particularly when the principles associated with human rights and fundamental freedoms of others are opposed to Islam (Vyver and Green, 2008). For example, shariah strongly oppose homosexuality and has consequently resisted legal reform measures prohibiting discrimination based on sexual orientation, and recognition of same sex unions or marriages. In moments like this, the right to freedom to exercise shariah become subject to restrictions by law so as to protect fundamental human rights of others (Vyver and Green, 2008).

Kenyan courts have ruled that international obligations to the United Nations (UN) charter, including freedom to religion, do not necessarily sanction force of law without going through the rigors of domestication. As a result, Kenya has been referred to in legal terms as a dualist state (Ambani, 2010). This implies that international laws are adopted in considerations to the Kenyan situation before they can operate in the country as law. However the right to religion and by consequence the right to shariah for Muslims is applicable to Kenya since the Constitution guarantees this entitlement conditionally, as long as no religion is state religion, and the separation between state and religion is maintained.

There is no doubt, however that the colonial phenomenon in Kenya greatly undermined Islam and particularly the application of shariah as positive law and public policy. The Berlin Conference of 1884-85 effectively flagged off colonialism in Africa, leading to Kenya becoming a Protectorate of British rule as from 15th June 1885. An Executive Order in Council of 1897, proclaimed the reception of English law into Kenya (Ambani, 2010). This action declared the supremacy of British Common Law in cases where there was an overlap. This situation presents clearly a case when "colonialism had the profound effect of delivering East African legal jurisdiction to the Crown at the West Minister''(Ambani, 2010). Henceforth, Kenya's legal system, like the rest of East African legal systems, articulated foreign values, traditions and cultures.

Initially, colonialism had little effect on the application of shariah as the later continued being a source of law in the coastal strip of Kenya. However, the repugnancy clauses aimed at avoiding those aspects that Europeans found most appalling, ridiculous, and unhelpful, had negative implications for the application of shariah in public (Ambani). The period immediately after the independence of Kenya witnessed a situation where shariah suffered tremendous usurpations on the legal front. This legal usurpation has been through the Constitution, Acts of Parliament, judicial decisions, and human right movement.

As a significant instrument of the country's legal system, the Kenyan Constitution impacts on the shariah as positive law and public policy in three important ways. First, the Constitution is considered the supreme law of the Republic of Kenya, to the extent that any law, including customary law that is inconsistent with the Constitution is considered to be void due to the inconsistency (Ambani,2010).This implies that the

application of the shariah in Kenya has to conform to the Constitution for it to be considered legally sound and valid. In this way, the Constitution in Kenya offers an important yardstick against which to measure all other laws, customs, practices and conventions (Section 77 of the Independence Constitution of Kenya).Clearly, some aspect of shariah could be considered void because of their inconsistency with the constitution.

The Independence Constitution at section 77 stipulated that no one shall be tried for a criminal offence, unless that offence is written in the laws of the state, and the penalty thereof prescribed. This provision had the effect of rendering the entire shariah on criminal aspects invalid due to the supremacy of the Constitution on legal matters (Section 77 of the Independence Constitution of Kenya).The third impact of the constitution on the shariah as statutory laws in Kenya is through the Bill of Rights that ironically allows for religion, yet subjects it to the limitations of public morality, safety, health and the rights of others (Ambani, 2010).

Apart from the Constitution's onslaught on shariah, various Acts of Parliament in Kenya have also dealt severe blow to the Islamic laws. For instance, the repugnancy clause of the legislation has greatly affected the application of the shariah due to the imposition of Western values as the "ideal" basis of evaluation (Ambani). In this regard, some analysts have observed that the repugnancy clause was meant to rule out laws and customs perceived to be against Christian values and morality or cruel and unusual to the standards of the colonizers (Ocran, 2006). A British Judge ruling in a East Africa court in 1938 on the issue of repugnancy observed "that the only standard of justice and morality which a British court in Africa can apply is its own British standard" (*Gwao bin Kilimo v*

Kisunda bin Ifuti, 1938). Through the lenses of western value standard, several customs of the indigenous people that were viewed to be repugnant were condemned and rejected by the colonial administration (see *Gwao bin Kilimo v Kisunda bin Ifuti* (1938). Based on the same clause of repugnancy, African customary marriage could not stand. The colonial court, apart from declaring the marriage as repugnant to justice and morality, also described the payment of bride wealth as "wife purchase" (Ambani, 2010).

The passing of the Law of Succession Act in 1981 in Kenya superseded all forms of applicable customary, Hindu or Islamic laws of succession (Ambani, 2010). The integration of this law was widely acclaimed as a positive step towards the protection of the rights of spouses after the death of a partner. Recent enactment of the Children Act has also withheld all manner of items pertaining to children from the domain of shariah in some aspects (Ambani, 2010). It is instructive however that for the Muslims, a clause excluding them from this rule was passed in the 1990s (Cotran, 1996).

The 2010 Constitution of Kenya, however, has eroded the gains of a wide scope of operation consolidated by the shariah following the previous exclusion from Succession and Children's Acts. The Constitution has brought back a strict agenda modeled upon international human rights, and non-discriminatory norms. The resultant trend in the end has seen the shariah, as positive law, left with potentially minimal spheres of influence in the Kenyan legal system with regard to women and children issues.

Despite the dynamics engaged in shariah as a contemporary consequence, its survival in the modern times as a practical system of law provided by Allah for guidance, inspiration, and leadership of Muslims is still assured. Within the Kenyan context, the

Kadhi courts as demanded by the Muslims during the constitutional review moment for the 2010 Constitution reflected two trends. The demand could be seen as attempts by Kenyan Muslims to align the shariah personal laws to their circumstances as was occasioned by the prevailing "social conditions of the 20th century." Nothing informs this position more than the fact that topical social issues of the 20th century such as that of gender had also become issues related to the *Kadhi* court operations in Kenya.

The gender trend could be deduced from a Mombasa *Kadhi* who had made a commitment to his female plaintiffs and called himself a "woman's *Kadhi*" both in public and private. This *Kadhi* had become a champion for woman affairs by awarding rulings heavily in their favor (Brown 1993). Among the recommendations of the CKRC was to accord a position of responsibility to women in the *Kadhi* courts. It was the position of this study that, this demand for reform of *Kadhi* court operations in Kenya, as could be deduced from the gender sensitive recommendation by the CKRC, belonged to the category of reformation by *siyasah* rather than through *taqlid* as was the case in some Muslim countries like Egypt.

Secondly, the study further maintained that, the demand for *Kadhi* court entrenchment in the country's Constitution reflected an on-going nationalism effort. This was to the extent that Muslims wanted to identify themselves in the character of Kenya as a nation. This is informed by the nationalistic principle that the sum total of the national character of a country should be the product of the component groups (Parekh, 2011).

4.5 Conclusion

In summary, in this chapter, while acknowledging constitutionalism as an important tool in managing diversity in the contemporary world, the researcher notes that this tool is not deployed adequately for full integration of Muslims into the Kenyan nation. The chapter also acknowledged the increased number of women seeking services of *Kadhi* court in comparison to that of men. Statistics adduced in this chapter evidently indicate an increasing demand for the judicial services of the *Kadhi* court.

Analysis of the judicial status of *Kadhi* court in the judicial system of Kenya indicates that the court is facing both internal and external challenges. These challenges have potentially implied a decline in the status of the *Kadhi* court. Consequently, the Muslim demand for the *Kadhi* court could be read in two-fold; attempts to realize full integration into the Kenyan nation and aligning their judicial structures with the contemporary world situations.

The chapter that follows turns to the examination of the debates surrounding the entrenchment of *Kadhi* court during the constitutional moment that delivered the 2010 constitution in Kenya. The said examination will rely to a considerable extent, on the Muslim integration into the Kenyan nation as a position, and the aligning of the Muslim judicial structures with the contemporary world situation as the two-fold basis for the Muslim demand for the entrenchment of *Kadhi* court in the 2010 Constitution of Kenya.

CHAPTER FIVE

The Secular State and Kadhi Courts: The Constitutional Debate in Kenya

5.0 Introduction

This chapter examines the debates that ensued during the constitutional review moment with regard to the entrenchment of the *Kadhi* court in the 2010 Constitution of Kenya. The genesis of the constitutional review in Kenya is examined and the views for and against the entrenchment of the *Kadhi* courts are addressed. The opposition to the entrenchment of *Kadhi* court in the Constitution on grounds of secular state is isolated and analyzed in the specific context of Kenya.

5.1 The Genesis of the Constitutional Review in Kenya

More concretely, reform movements in Kenya can be traced to the struggle to change the political system from one party to a multi-party democracy. This movement gathered great momentum in the 1990s. This study suggests that things fell apart constitutionally in Kenya soon after independence. This can be deduced from the independence struggle values that soon became irrelevant. Nothing informs this position better than Jaramogi Oginga Odinga in the title of his book, *Not Yet Uhuru*; in which he alleged a design by the main political elite backed by foreigners to renegade on the pre-independence constitutional values and agreements (Odinga, 1967). However, active constitutional debates on reform are a feature of the late 1980s. These debates on reform brought together individuals and organizations from many sectors of the society and parts of the country. At the forefront of the movement were political, civil, religious, women,

and human rights organizations. At first the government resisted these demands for reform and only gave in to the pressure later (Committee of Experts on Constitutional Review, 2010).

In the middle of the 1990s, the Kenyan government entered into discussions on the method for the review of the Constitution with those agitating for reform. An agreement was reached on the purposes and method of review that was included in an Act of Parliament in 1998. A broad based Review Commission was to be established to collect the views of the public, and prepare a Draft Constitution for consideration by a special constitutional assembly. However, political parties were unable to agree on the composition of the Review Commission and the agreement collapsed. The struggle for reform continued, but the efforts to bring about a national process of review were unsuccessful (Committee of Experts on Constitutional Review, 2010).

These disagreements almost derailed the constitutional reform venture. The Constitution of Kenya Review Commission (CKRC) came into being as a result of the merger of two parallel processes. After the failure of the government and civil societies to agree on a common process of review, the Ufungamano Initiative, as the civil society venture came to be known, set up the People's Commission of Kenya to review the Constitution in June 2000 under the chairmanship of Oki Ooko Ombaka. However, in October 2000 Parliament passed the Constitution of Kenya Review Act, under which a fifteen member Constitution of Kenya Review Commission (CKRC) was established (Musila, 2008, 60).

In March 2001, an agreement was reached on the merger of the Commissions, and in June 2001, the Constitution of Kenya Review Act was amended to increase the

membership of the Constitution of Kenya Review Commission to include ten members of the People's Commission and two nominees of the Parliamentary Select Committee on Constitution. The new Constitution was to be based on the principles of democracy, accountability, human rights, social justice and people's participation. To that end, the Commission recognized that the path to national peace and unity did not lie in imposing some kind of artificial homogeneity as many countries seemed to think in early days of independence (Committee of Experts on Constitutional Review, 2008).It acknowledged that Kenya consisted of numerous ethnic communities with different histories, languages and traditions. For that reason, national unity was threatened when specific communities felt marginalized, victimized, or that their culture was not given due respect. Unity had to be built on these diversities, so that within a common national identity, laws and practices had to accommodate the exercise of cultural, social and religious differences. Underlying these objectives was the critical need for national peace, unity and integrity in order to safeguard the well-being of the people. This goal took a particular significance from the ways in which Kenya's politics had become so deeply ethnicized (CKRC, 2002).

The CKRC was mandated with the task of conducting and facilitating civic education, listening to Kenyans and recommending proposals for constitutional reform. The Commission embarked on gathering the people's views through public hearings in Nairobi and the Provincial Headquarters in early December 2001. Hearings went on in Nairobi until end of July in 2002. From April to August 2002, CKRC visited every constituency for hearings. In total, 35015 submissions were received, most from organized groups like political parties, religious communities, professional organisations, trade unions, non-governmental organizations, and ethnic communities, (see Chessworth,

2011, and CKRC, 2002, 4). CKRC Commissioners took note of the public views and made effort to reflect them in the report, and recommendations of the CKRC Draft Bill. This was followed by a series of national constitutional conferences (NCCs) held at Bomas of Kenya, Nairobi, as follows:

1.Bomas (i) between April and June 2003

2.Bomas (ii) between August and September 2003

3.Bomas (iii) between January and March 2004

The proceedings became increasingly turbulent during Bomas (iii) because of the place of Islamic law within the Constitution, resulting to the collapse of the inter-faith aspect of the constitutional review process. The Bomas Draft, as the resultant report from the National Conferences on Constitution at Bomas came to be known, extended the role of the *Kadhi* court to include small claims procedure, administration of *wakf* (religious endowments) and the establishment of an appeal court applying Islamic law. The various meetings that followed the Bomas Conference saw production of a final Draft by the then Attorney General, Amos Wako. This Draft became known as the Wako Draft, and mainly sought to appease Christians and the other non-Muslim stakeholders, by establishing a religious courts clause rather than *Kadhi* courts. Wako Draft was defeated at a Referendum held on 21st of November 2005. Furthermore, the post-election violence of 2007 saw the review process set in motion to draw up a new Draft Constitution under a Committee of Experts (CoE), sworn in office in March 2009. In November 2009, the CoE published the "Harmonized Revised Draft Constitution of Kenya," that like the previous Drafts included a clause on *Kadhi* courts similar in many ways, to the same provision in the Independence Constitution but limiting *Kadhi* court to the former

protectorate. This implied that *Kadhi* court could only apply within the ten mile strip from the coast. The revision of Harmonized Draft Constitution by the Parliamentary Select Committee produced the "Revised Harmonized Draft Constitution of Kenya," which was subjected to and passed at a Referendum held on 4th August 2010, thereby becoming the 2010 Constitution of Kenya. The "Revised Harmonized Draft Constitution of Kenya" unlike the former "Harmonized Revised Draft Constitution of Kenya" omitted reference to "former protectorate" and thereby empowering Muslims to hold *Kadhi* courts having jurisdiction within Kenya, (Chessworth, 2011). It was clear that under the CKRC and later CoE, Muslims continued to consider the *Kadhi* court as compatible with the Kenyan State, as reflected by the growing trend to perceive *Kadhi* as holding a legal rather than religious mandate (Vanderpoel, 2012). The key finding of the CKRC's primary survey was the desire for *Kadhi* court reform so that a *Kadhi*'s responsibilities could "be restricted to judicial work" and a separate spiritual leader (*mufti*) elected to represent the community on religious affairs (Hashim, 2005). The Commission found that majority of Muslims surveyed preferred that *Kadhis* hold the same qualifications as other magistrates within the Kenyan judicial system. In addition, the *Kadhi* should not only be conversant with Islamic Law but also be trained in secular law, so that their courts can be fully considered part of the judicial system (CKRC, 2002). These findings by CKRC show little evidence that Muslims in Kenya perceived *Kadh*i court as a point of tension with their political membership in Kenya, but rather the views suggested a desire toward greater incorporation of the court and compatibility with the Kenyan state (see also Cussac, 2008).

5.2 The Emerging Concerns about the *Kadhi* Court in the Constitution: To Entrench or Retrench the Court

This section summarizes the views given and concerns raised by people, organizations, institutions and experts on the *Kadhi* court (CKRC, 2002). First, it was suggested that there is need to consult Muslims in the appointment of the Chief *Kadhi* and other *Kadhis*. Muslims recommended to be mandated to either elect these judicial officers or be members of the appointing authority. Muslims appealed that organizations such as the Supreme Council of Kenyan Muslims **(**SUPKEM) be consulted about these appointments, and the *Kadhi*'s minimum academic qualifications be set at a degree in Islamic Law from a recognized university (CKRC, 2002, 9).

Another suggestion was on empowerment of the *Kadhi* court institution with the intention to enable it deal effectively with its work. Towards this end, Muslims recommended the setting up of a Scheme of Service to streamline *Kadhi'*s terms of service, and conditions of employment that included salaries, staff and communication facilities. Closely related was the view that the Chief *Kadhi* be given the same status as a High Court Judge and the rest of the *Kadhi* be accorded the status as those of the Chief Magistrate. On the number of *Kadhi* courts, some Muslims maintained that they should be increased to cover every Province and District (CKRC, 2002, 67).

Establishment of a separate Appeal Court applying Islamic law, and appointment of Muslim Judges and expert in Islamic Law to the High Court, to hear appeals from the *Kadhi* court was another suggestion. This was equivalent to a kind of vertical expansion of the mandate of the *Kadhi* court. The horizontal expansion of the mandate of the *Kadhi*

court could be discerned from the view of empowering the *Kadhi* court to determine both the substantive and procedural law on inheritance and succession for Muslims. Still in this respect, some views held that the *Kadhi* court be expressly empowered to deal with not only divorce in Islamic marriages, but also on issues such as maintenance and custody of children, guardianship, adoption, division of matrimonial properties after divorce and other matters incidental to and connected with the same. In addition, Muslims proposed to increase the powers of the *Kadhi* court to include handling civil and commercial cases involving Muslims (CKRC, 2002, 9).

There was concern that the *wakf* commissioners appointed under the *Wakf* Commissioners Act had failed to administer the *wakf* properties under their charge to the satisfaction of the dependents and beneficiaries, thereby considered as not representative, transparent and accountable. The institution of *wakf*, therefore, attracted the opinion of its abolition, and that its functions be assigned to the *Kadhi* court in the respective districts where the Commission operated. Furthermore, the application and operation of the *wakf* Commissioners Act be extended to cover the whole country and not just the coastal region as was the prevailing stipulation (CKRC, 2002, 9).

A gender angle to the emerging concerns about the *Kadhi* court could be deduced from the analyzed view, and recommendation by the CKRC that each *Kadhi* be accorded a female assistant to handle delicate cases involving women. The need for general re-organization was also raised, when it was observed that although the *Kadhi* courts have a constitutional mandate to apply Islamic law in their courts, the practice is that the mandate is not effectively administered, due to lack of an institutional legal framework by legislation and other administrative measures. Further, some observed that *Kadhi*'s

work be restricted to judicial work and Muslims be mandated to elect their own Islamic/spiritual leader (*Mufti*), who will be the official spokesperson and advisor to the government on issues affecting Muslims in Kenya. This would exclude the Chief *Kadhi* involvement on matters like *Idd* celebrations and other non-judicial work like citing the moon to end fasting, giving mosque sermons among others (CKRC, 2002, 9).

As religious minorities comprising an estimated 10% of the population, Kenyan Muslims view *Kadhi* Court as not only religiously important, but also a symbol that the state accepts Islamic practice to be compatible with political membership. The courts are symbolic, in the sense that their constitutional recognition can be considered the result of a political deal to facilitate the integration of the Muslims within the country. This argument is similar in motivational terms to that of the Arab Muslims' at independence when there was fear that Arab-inspired traditions and laws would lose influence to the African traditions (Ndzovu, 2009).

Reference to shariah as Muhammadan law was viewed both as misleading and inaccurate for it placed primary focus on Prophet Muhammad rather than on Allah as should always be the case. This position informed the view that *kadhi* court is re-named Islamic shariah courts, and references to Mohammedan law be changed to Islamic law or Shariah. Other views expressed included the observation that Islamic law is taught at the public universities, and Muslim Personal Law be codified into legislation. Furthermore, it was observed that Muslims of the *Shia* Sect be appointed as *Kadhis* so as to cater for the interest of their community, and that the supremacy of Muslim Personal Law be affirmed over all other laws for the Muslims, in matters of Personal Law (CKRC, 2002, 8-13).

5.3 Tentative Recommendations by the CKRC on *Kadhi* Court

It has been argued that CKRC Report accorded the *Kadhi* court an enhanced status in the proposed constitution. The Independence Constitution had accommodated the *Kadh*i court in various sections, and not all the recommendations were new issues as they had been provided for in the constitution. An aspect that was not there before was the recommendation to expand the jurisdiction of the *Kadhi* court to deal with civil and commercial matters, where both parties professed Islam, as well as a provision for female assistants to be seconded to the courts to assist in dealing with delicate and intimate issues affecting women litigants (CKRC, 2002).

The later recommendation found support from the trends in *Kadhi* court operations characterized by dramatic increase and a reversal of women's roles in the *Kadhi* court where women had increasingly dominated as the plaintiffs as the statistics in the previous chapter on the *Kadhi* court operations in Mombasa between 1958 and 1982 show. Despite the general requirement that the female assistants have basic knowledge of Islamic Law, their role was to be equivalent to administrative rather than judicial officers, which prevented them to deputize the *Kadhi*. This position could be justified easily in the light of Islamic sources, (see CKRC, 2002, 9-10) but not so easily with the Constitution that had a mandate to among other things, safeguard on equality of both sexes. Clearly, this scenario presented potential for future clash between the *Kadhi* court and the Constitution.

Further recommendations touched on the status of the *Kadhi* courts in the general legal system of Kenya. In this regard, the CKRC had recommended that the Chief *Kadhi* should have the same status, privileges and immunities as a High Court Judge, while the

Senior *Kadhi* as a Chief Magistrate and eventually the *Kadhi* as a Resident Magistrate. The composition of the Judicial Service Commission too was expanded to include the Chief *Kadhi* and a Muslim woman nominated by National Muslim Organizations. Muslim Lawyers who were experts in Islamic law were to be appointed as Judges of the High Court to hear appeals from the *Kadhi* court of Appeal. Moreover, Muslims were to be consulted in the nomination and appointment of the Chief *Kadhi* and the *Kadhis,* either through their participation in the process through an election, or by their duly appointed representatives (CKRC, 2002, 67-68).

About the rules, practice, procedure, and evidence in the *Kadhi* court operations, the mandate was bestowed on the Chief *Kadhi* in consultation with the Chief Justice and the Law Society of Kenya. It is worth noting that, in this regard, the Chief *Kadhi*, *Kadhis* and by extension the *Kadhi* court was recognized as judicial institution in accordance with the provisions of the Constitution. Clearly, the *Kadhi* court legal content as recommended by CKRC drew heavily from the moral capital of Islam. However, the observance of the rules, practice, procedure and evidence to a considerable extent depended on the state enforcement. Muslims in Kenya looked to the state to provide uniform procedure to be employed in the *Kadhi* court because there is "lack of an institutional legal framework by legislation and other administrative measures" (Hassan, 2002).

The issue of the *Kadhi* court became a source of conflict from the beginning of the constitutional deliberations up to the end. The *Daily Nation* reader sample comments in facebook, June 3, 2010 at 4.26 am, following the article "Muslim clerics want *Kadhi* ruling stopped," captured a range of arguments that go along to confirm the political

tensions that surrounded the issue of entrenching the *Kadhi* courts in the 2010 Constitution of Kenya. It is clear that the entrenchment of the *Kadhi* court in the 2010 Constitution of Kenya was perceived variously. Historical, economic, religious rivalry and the secular state grounds were some of the premises that stood out. The following sample of responses from the said facebook session confirms this observation:

> "…Nobody will remove the Kadhi's courts from the constitution. It's been there ever since…)
>
> "…So what, we want Christian court too. We don't need Muslim law in our constitution because we are not Muslims and this is our native country…"
>
> "…God, protect our nation in Jesus name I pray; Amen…"
>
> *"...Kadhi* courts for the constitution...*wenye wivu wajinyonge* (and there is nothing you can do)… who said Christianity is native to Kenya...read your history books again or you can go back to Congo from where you came from..."
>
> "…Muslims are here to stay and we will support them with whatever means …*Kadhi* courts and religion beliefs should remain in the religions laws. What does it have to with my Children?.."
>
> "…We want Muslim law in our Constitution because we are Muslims and this (Kenya) is our native country too…"
>
> "…I support them, they should even go to the Hague and inform Ocampo, Its high time we respected minority rights. For the Christian Fundamentalists, Kadhis Courts are here to stay. They have never posed any harm, Never will they. The only group who are a ticking time bomb is the one headed by Canon (name

withheld) and Mark (the other name withheld) with their American financiers. Next they will demand that all MPs must be Bishops...**"**

" …Kadhi court was there even before you were born and it continue to be there even when your great great grand children will be born...so the matter about *Kadhi* is not a question...the question is how many acres have u grabbed....the catholic church grabbed land in Mau forest and that is what the arch-Bishop and the his cahoots are defending. *Kama hutaki Kadhi, Hamia Rome* (if you are against entrenchment of Kadhi court then migrate to Rome) …"

"…My fellow Kenyans stop arguing and shouting. Please take your time, read history of Kenya. We are all brothers and sisters in our Motherland, products of the same soil. Take a deep breath and remember the words in the National Anthem …"

"… stop peddling lies. Kadhi's Court were part of the 1963 Lancaster Constitution. Not at any time in independence Kenya Parliament history Constitution was amended to include Kadhi's Courts as you suggest. For your info, Kadhi's Courts exist in Tanzania's Constitution…"

"…for those who are against the *Kadhis* courts *poleni* (it is unfortunate)…The courts have been there since time immemorial. In case they have some hidden issues then they should come openly and say but not to take cover in simple issues that leads us completely nowhere…"

"…let them go wherever they want, to court or to hell I don't care. But my tax will not be used to cater for some religious courts…"

"…Chapter 2(8) says that there will be no state religion. So *hii kelele yote ni ya nini* (what is the noise for?) I can warship whatever I want, so mind your own business, so what has *Kadhi* court taken from Christians…"

"…The last kicks of a dying horse! If *kadhis* court is primarily essential to the Muslim community then they should allow their god to defend them like our God keeps defending us. The ruling was the religious justice of the year and its part of the government project because the judiciary is an arm of the government. *Haleluhya* ..amen!.."

"…the congregations should ignore the Christian and Islamic clerics. Let the sheikhs and bishops talk for and listens to themselves. This country is for us all be it Christians, Muslims, traditionalist, Pagans, Hindus, Judaists, Budhists, Orthodox et al. The Christian and Muslim clerics can be effectively ignored and rendered inconsequential…"

"…Is Islam the only religion in Kenya? And who said they are the Minority. Listen you Muslims you know your sheria laws even without reading why fill the Constitution pages with such a nonsense? Hypocrites, cursed, jealous and selfish people…"

"… *Kadhi* courts have been there ever since, there've never been problems before Kenyan Muslims are very good people who've co-exited with the rest of Kenyans. This notion by few fundamentalist Christians to confuse Kenyans on this issue of *Kadhi* court..."

A section of non-Muslim religious leaders comprising of Presbyterian Church of East Africa,Inland Church of Africa,Jesus is Alive Ministries, and Nairobi Pentecostal Church among others came out strongly to oppose the entrenchment of the *Kadhi* court in the Constitution turning the issue into one of the most contentious one during the constitutional review moment. Even during the harmonization of the Draft Constitution by the Committee of Experts (CoE) whose work largely delivered the 2010 Constitution of Kenya, the *Kadhi* court still raised disagreement (CKRC, 2010). The National Council of Churches in Kenya (NCCK) maintained that the CoE ignored their concerns to omit contentious issues. The General Secretary maintained that unless the Islamic courts were stricken from the 2010 Draft Constitution, Christians might be forced to reject the document in the National Referendum later that year (see CKRC, 2010).

Several reasons were advanced by the opposition to the entrenchment of the *Kadhi* court in the 2010 constitution of Kenya. In February 2010, twenty three leaders of the Church and Christian organizations released a statement that the Muslim community is "carving for itself an Islamic state within a state", which "is a state with its own shariah compliant banking system, compliant insurance, bureau of standards, and pressing for own judicial system." (seeThe High Court of Kenya 2010, 5). The opposing churches further alleged that it was a mistake to entrench the *Kadhi* court in the Independence Constitution since Islam if unchecked has the potential of becoming dangerous. More relevant to the study was the view that entrenchment of the *kadhi* court was offensive to the doctrine of separation of state and religion, and that the Muslim demand had a hidden agenda to propagate Islam, as allegedly attributed to the Abuja Declaration. A counsel representing a section of the Church in a court case against the entrenchment of *Kadhi*

court in the constitution, drew attention to the Abuja Declaration by presenting an alledged Top Secret document (The High Court of Kenya, 2010, 5).The contents of the Top Secret documentwere consistent with both the Communiqué issued at the end of the "Islam in Africa," Conference and the aims and objectives of Islam in Africa Organization (IAO); an organzation established at the end of "Islam in Africa Conference" in Abuja in November 1989. This declaration was the basis of the "Abuja declaration," cited many times by the opponents to the entrenchment of *Kadhi* court in the 2010 Constitution of Kenya (see The High Court of Kenya, 2010, 5).

In response, Muslims countered forming a continuum that ranged from passionate pleas, to the extreme positions involving thinly veiled threats. In one instance, a Muslim informant observed that, "... constitutional making was a progressive process that made the old better, and not the curtailment of rights already inexistence..." (Interview with a Muslim key informant in Nairobi on 6th February 2010). The then Chief *Kadhi* of Kenya was compelled to put the record straight on the issue of Kadhi court in the constitution as follows;

> "*Kadhi* courts only deal with divorce, marriage, and inheritance cases in the Muslim community and a Muslim who commits a crime that can not be handled by *Kadhi* courts is punished according to Kenyan law" (Daily Nation of Wednesday 9th August 2009).
>
> .

The Chief *Kadhi* maintained that the entrenchment of the Islamic courts in the 2010 Constitution of Kenya would recognize a basic religious right for a minority group. He observed that the courts were established decades ago, and that the debate on whether to

entrench or retrench the *Kadhi* court in the 2010 Constitution of Kenya was the result of "Islam Phobia," ((Interview with SUPKEM official, 2013). An interview with an informant from the Catholic Church had confirmed the "Islam phobia" thesis attributing to statistics about Muslims holding high national positions in Kenya, and that Muslims were slowly taking over Kenya (Interview with Key informant from Catholic Church, 2012). The Chief *Kadhi* maintained that the position of the Church was creating hatred between Muslims and Christians, a mood captured by other Muslim commentators. A Muslim commentator with an International Crisis Group captured the mood of the conflict arguing that "the *Kadhi* court issue feeds into historical prejudices on both sides and misperceptions which have increased in the last ten years" (Interview with a key Muslim informant in Nairobi on 6th February, 2010). Affidavits supporting the entrenchment of the *Kadhi* court submitted to the CKRC, and made available to this researcher, captured a range of arguments including that the freedom of expression guaranteed the rights of religious practitioners, that Kenyan brand of state secularism should accommodate diversity, and that the separation of Church and State did not preclude the State from protecting religious minority practices (confirmed in an interview with SUPKEM official, 2013, see also The High Court of Kenya, 2010). These Muslim views in favor of entrenching *Kadhi* courts in the 2010 Constitution of Kenya clearly show little evidence that Muslims perceived *Kadhi*' court in the Constitution as a point of tension.

Nothing informs better on the nature and intensity of the debates on the *Kadhi* court than the civil application case 890 of 2004 at the High Court of Kenya (The High Court of Kenya, 2010). In this case, twenty six Church leaders sought legal redress over

the entrenchment of the *Kadhi* court in the Independence Constitution. The applicants were led by the Very Right Rev. Dr. Jesse Kamau the Moderator of the Presbyterian Church of East Africa, Bishop Silas Yego of the Inland Church of Africa, Bishop Margaret Wanjiru of Jesus Is Alive Ministries,the Rt. Rev. Dr. David Githii**,** Bishop Arthur Gitonga, Bishop Boniface Adoyo of Nairobi Pentecostal Church, and the other Reverends against the Attorney-General as 1st Respondent and the defunct Constitution of Kenya Review Commission (CKRC) as 2nd Respondent. This civil application case saw Kenya's lengthy constitutional review process reignite questions on how a secular state should accommodate a variety of religious practices, notably, the *Kadhi* Court. The case coincided with two statewide referenda on whether Draft Constitutions should be adopted. The 2004 Bomas Draft constitution and the 2010 Constitution retained the provisions for *Kadhi* court from Section 66 of the Independence Constitution. While the Bomas Draft was rejected in the 2005 referendum, the High Court did not decide on the case until May 2010, when the country was preparing for its upcoming Referendum in August.

The plaintiffs in the *Jesse Kamau and 25 others v. Attorney General* as the case came to be known submitted four arguments against the constitutionality of the *Kadhi* court. They argued that the *Kadhi* court's constitutional entrenchment lacked historical basis in Kenya, and afforded special treatment to Islam, thereby violating the equal protection guaranteed in the Bill of Rights. They further argued that entrenching the *kadhi* court in the Constitution violated the separation of Church and State and the secular nature of Kenya. Further, they contested that *Kadhi* court promoted an Islamic agenda, whose ultimate objective is to turn Kenya particularly into an Islamic nation, and that

Kadhi court constituted a stepping stone for the total introduction of sharia (The High Court of Kenya, 2010,).

The issue of Islamic agenda provides an instance when the *Kadhi* court debate acquired international status. The then United States of America Ambassador to Kenya Michael Ranneberger reflecting this dimension joined the fray by urging Kenyans to vote in favor of the *Kadhi* court entrenched constitution for the purpose of Kenyan unity and stability. However, in opinion pieces conservative United States of America Christian groups denounced the proposed Constitution. They were opposed to the *Kadhi* court entrenchment provision as well as believing that there was an overall Islamic agenda geared toward the Islamization of the country. Such instances of internationalizing the debate served to support the position that the *Kadhi* court debates in Kenya at times acquired the status of a global Muslim–Christian conflict in miniature.

According to Kamau verses Attoney General case, the represented churches sought the following declarations from the high court:

> That Section 66 of the Constitution of Kenya which introduces and entrenches *Kadhis'* Courts in the said Constitution infringes on the Constitutional rights of the Applicants to equal protection of the law embodied in Sections, 70, 78, 79, 80 and 82 of the Constitution and to that extent is discriminatory, unconstitutional and should be expunged in its entirety from the said Constitution...That any or all provision(s) such as Section 66 of the Constitution and Section 197 (2) 198, 200 (1) (e) of the "Zero" draft that seeks(s) to introduce and/or entrench, promote, elevate, encourage, advance, give special preference to, support by public

> funds or otherwise any religion or sectarian religious interests or such interests of a religious nature or otherwise that draw their base from a given or known set of religious teachings/doctrines, practices and/or beliefs in the Constitution is and would be discriminatory, oppressive to the applicants and others, offensive to the doctrine of separation of state and religion retrogressive, unconstitutional null and void*(The High Court of Kenya 2010, 1).*

Similar concerns and opposition to the *Kadhi* courts were also echoed by the Catholic Church captured ina report by the Kenya Episcopal Conference entitled "Choose Life and You Will Live," signed by twenty five Bishops from the entire Republic.

On the other hand, the Hindu community too argued *that* if Muslims alone get preferential treatment for setting religious courts, then other communities and faiths would come forward to have separate courts. They concluded that no single religion should be mentioned in the 2010 constitution of Kenya in order to maintain its neutrality. They recommendedthe incorporation of religious courts for all major religions to deal with personal law relating to marriage, divorce and inheritance *(*The High Court of Kenya 2010, 1).

The Kamau versus Arttoney General case expoused the Church's position on the doctrine of separation of Church and State, arguing that the State and religion have their own sphere, the former of making law for the public good, and the latter for moral welfare of individuals and their God. The Church leaders argued that the Muslim faith is favoured by the state through the establishment and funding of *Kadhi* courts through the

public; a position that violates the principle of separation of state and religion (The High Court of Kenya 2010, 1). The logic behind the Kamau versus Arttoney General case was that if the *Kadhi* court could be established as unconstitutional in the Independence Constitution, then the same ruling would apply to the *Kadhi* court entrenchment in the 2010 Constitution (The High Court of Kenya, 2010). The judgement awarded most of the appeals requested by the applicants.

In summary, the judgement maintained that constitutionally, the *Kadhi* court should be restricted to the ten mile coastal strip, and their presence in the Constitution uplifted Islam above other religions. The judgement further opined that the *Kadhi* court was a financial burden, and a form of discrimination over other religions. However, Funderburk has argued that the *Kadhi* court do not act as a financial burden to the rest of Kenyan population, because currently they are operating in low financial overhead, and that Muslims are certainly paying more in taxes than the minor costs of a *Kadhi* court system with only 17 courts for the entire country. Nevertheless, the High Court ruled that *Kadhi* court in the Constitution offended the separation of religion and state (The High Court of Kenya, 2010). At this point a question could be asked: Does the entrenchment of the *Kadhi* court in the Constitution compromise the state secularity of Kenya? This is the main problem of the study that I now turn to

5.4 Is Kenya Assertively, or Passively Secular?

The constitutional review process retained the original provisions of the Independence Constitution on the freedom of religion, but addressed the relationship between religion and the state more explicitly. Article 9 of the 2004 Bomas Draft Constitution held that: "(1) State and religion shall be separate; (2) There shall be no state religion; (3) The state shall treat all religions equally." It is noted that the Kamau versus Attorney General was filed to dispute *Kadhis*' Courts in the Bomas Draft and makes reference to these provisions. The 2010 Constitution of Kenya contemporary with the Kamau versus Attorney General Court's ruling shortened the provisions on religion and state in Article 8 only as: "There shall be no state religion."

The separation of religion and state is not unique to Kenya as it is an important constitutional principle founded on practicalities of constitution making. It is argued by constitutional experts that if there existed a state religion, chances are that the state could easily infringe on the freedom of religion of the other. This principle informs that the state should not treat one religion as superior to the other by according unfair economic privileges to one over the others; and acknowledging one religion over the others (CKRC, 2002, 28). The CKRC maintained that the majority of Kenyans held that the Constitution should be neutral especially on religious matters. It should create a level playing ground where all religions can enjoy and uphold their religious freedom. This implied that the Constitution should not guarantee a position where a certain religion is empowered than the others, unless there is a reason to do so, especially when dealing with a minority religious group (CKRC, 2002, 28). How then do we understand the relationship between

religion and state with reference to Kenya? Is it the case of assertive or passive secularity?

Van der Vyver and Green maintain that a secular state seeks to uphold a wall of separation of religion and state, compelling political authorities and state institutions in their official capacities to distance themselves from religious practices. This position fits well with assertive secularism as presented by Ahmet Kuru discussed earlier. Green and Van der Vyver argue that religiously neutral states on the other hand do not preclude from participating or sponsoring religion, but aim to uphold equal treatment for all religions (Van der Vyver and Green,2008, 345). Considering the two positions of state religious neutrality (passive secularity) and state assertive secularity, in reference to the Kenyan state, it is admittedly clear that the country leans toward passive as opposed to assertive state secularity.

Yet, it would be difficult not to admit that Kenya, like other modern nation states has witnessed "the displacement of God, and its replacement with the national boundary,"(see Van der Vyver and Green, 1956, 461-463). Indeed, it is true that in Kenya, as in other modern nation states, religion is reduced to the service of the power and glory of the state."(Van der Vyver and Green, 1956, 461-463). The modern nation state more often is a neutral arbitrator between and among the diverse ethnic religious groups. When the nation state arbitrates between diverse religious groups, it does not play the role as an equal partner to the religious groups, but as a player above any religion. On matters of reference during the arbitrations, the modern nation state can only refer to itself. In this format where state's reference is from within (Constitution), rather than to the beyond (read as religion),the state becomes secular. The same logic is true of all

modern nation states in the West that draw heavily from Christianity, yet the observance of the Christian based laws in these countries is not construed as worship, but the result of state compulsion (Okullu, 1974, 9). In this way, the Christian based moral values become legal obligations. Their observation forfeits their faith-based (religious) significance, becoming increasingly secular (Rushdoony, 2011).

In this respect secular laws are moral laws, representing various religious moral systems (Rushdoony,, 2011). For example, secular laws against manslaughter and murder are moral laws as echoed in the commandment, "Thou shalt not kill"; While laws against theft are commandments against stealing; slander, libel and perjury laws, enact the moral requirement, "Thou shalt not bear false witness"; Whereas traffic laws are moral laws expected to protect life and property as reflected in the Ten Commandments. Laws on policing and court procedures have a moral obligation to promote justice and protect law and order. What previously constituted religious morality is profaned or secularized when the final reference point shifts from the transcendent to the immanent within.

The secular state concept as it applies to Kenya with regard to state–religion relations, operate in the form of "temporizing of values," (Majdid, 1980, 294), rather than the form of a complete worldview (Elmessiri, 1996, 43). However, as more values are temporized (made worldly), a complete secular world view is realized gradually by the state in Kenya. This is when the beyond is no longer the final referent point. In this study, it is clear that Muslims are aware of the official status of Kenya as secular, yet still they did not perceive any problem with the *Kadhi* court being part of the Republic. The apparent contradiction exhibited by the Muslims in Kenya tell much about Africa in

general, and Kenya in particular about the concept of secular state; a state that does not necessarily ignore religion.

Often much of the rhetoric above with reference to state-religion relations in Kenya can be taken to reflect the state's realization, and efforts to accommodate the importance of religion as a moral force within politics (Van der Vyver and Green, 2008, 344). It is noted as relevant in this respect when Kenya's status as a secular state in the Constitution was made by inference rather than reference. Why did the Constitution not declare expressly that Kenya will be a secular state? In response, this study views this as a tacit strategy to mediate with, rather than eliminate religion from the public sphere. This strategy supports the passive secularism thesis with reference to Kenya, and is partly evidence that religion still plays an important role in Kenyan comprehension of the essence of the world, and the eventual construction of the worldview.

Van der Vyver and Green's thesis finds application in the situation of Kenya, when they observe about the relations between state and religion. They argue that countries that are only few decades old (like Kenya) and with Constitutions that are few years old, often have Constitutions that share their status as source of authority with religion, culture, and human right norms. Law, religion and culture in such countries continue to be in a flux (Van der Vyver and Green, 2008, 356). Consequently, the separation of religion and state as is often the official constitutional statement cannot be applied in the strict and literal sense, as is the case of assertive state secularism. The study, therefore, submits that the opposition to the entrenchment of *Kadhi* court in the Kenyan Constitution on the basis that Kenya is a secular state failed to take cognizance of the passive nature of secular state phenomenon.

5.5 Conclusion

Chapter five builds on the discussion in chapter four. Chapter four of this study mentioned that Independence Constitution of Kenya was damaged through amendments that did not pay attention to constitutionalism. In response, ethnic mobilization became an important feature of the Kenyan politics as diverse groups engaged to secure for their lot in the nation. The constitutional review moment discussed in chapter five, viewed in this light provided a site and space for political battles between diverse ethnic groups in the country. The *Kadhi* court demand on the part of Muslims and the ensuing opposition from a section of the Church was partly driven by ethnic mobilization as the Muslims seized the opportunity to demand for recognition in the country. The employment of the secular state as the premise to retrench the *Kadhi* court from the Constitution, failed to take into consideration some peculiar aspects of Kenyan nation on state secularity as predominantly passive in nature.

On the other hand, with reference to the secular phenomenon, the entrenchment of *Kadhi* court in the Constitution had relative secular implication as the court lost its religious relevance as a reference point, due to tendency for the referent point to shift between the beyond and the state with the said constitutional arrangement. More vulnerable in particular to the shift are the faithful who do not comprehend the religious significance of the *Kadhi* institution, to relate them beyond the state and to ultimately connect them to Allah. Therefore, whether *Kadhi* court shift toward the secular or not, due to its entrenchment into a secular state constitution becomes a matter of approach varying with the level of individual's spiritual perception. In this way, the *Kadhi* court,

dispensation in the Kenyan Constitutional arrangement inhabits religious and secular worlds simultaneously. This position blurrs conventional political lines as was advanced by Fethullah Gülen's third way model mentioned in chapters two and three (see Yilmaz, 2012, 43).

CHAPTER SIX

Summary, Recommendation, Contributions and Conclusion

6.0 Summary

This study examined the general relationship between religion and society noting that this was a subject that had received much attention from scholars. The entrenchment of the *Kadhi* court in the Kenyan Constitution reflected public visibility of religion in an otherwise secular state. The process elicited religious tensions as a section of Church leaders opposed the entrenchment, citing the separation of religion and state as stipulated in the Constitution. Consequently, this study sought to establish the extent to which the argument against the entrenchment of *Kadhi* court in the 2010 Constitution of Kenya on the secular state premise reflected the Kenya nation. The study employed the conflict, critical and socio-cultural change theories as they related to the secular state phenomenon in the modern societies.

The socio-cultural change theory found application in this study, when the researcher observed that the resultant human-centered and world-centric atmosphere following renaissance had caused the previous religion-inspired medieval unity to start disintegrating without religion vanishing into oblivion, but giving up its previous superior position. The situation of religion in state as society undergoes transformation in modern times finds expression in the secular phenomenon, which assumes the form of institutionalization of religion as witnessed in the diminishing public presence of religion in state in modern societies. Today, most of the states in the world including Kenya have adopted the secular state ideology, reflecting the diminished role of religion in the public

sphere. The opposition to the entrenchment of the *Kadhi* court in the 2010 Constitution of Kenya cited the diminished public role of religion in the state, declaring that Kenya is a secular state. What was the implication of the diminished role of religion in state in Kenya. Critical theory was employed to address this issue. The theory applied in this study with the assumption that the secular state concept, as a cultural product, is influenced by the context in which it was produced or reproduced. This theory informed the study that state secularism is not a uniform phenomenon, and could not be applied rigidly, especially in Africa. The nature of state secularism to a large extent was a product of sociological, political and ideological junctures, peculiar to a given country's history, and Kenya as a country lacked such a juncture. The Muslim demand for entrenchment of Kadhi court in the 2010 Constitution and eventual debates surrounding it was interpreted from the point of view of the insights from constitutionalism and ethnic diversity as reflected in the Kadhi court stipulation in the politics of Kenya. Conflict theory on the other hand informed this study about state secularity, which as a normative concept could imply different meanings to different people. As a multi-dimensional ideology, secular state concept can be conceived variously. Consequently, the opposition to the *Kadhi* court entrenchment in the 2010 Constitution of Kenya on grounds that Kenya is a secular state reflected deep rooted conflict, demonstrating diverse backgrounds and competing interests for representation in the nation of Kenya. In short, the demand for and opposition to the *Kadhi* court entrenchment in the Constitution reflected conflict that could be resolved through a critical review of the secular state phenomenon.

The secular state phenomenon and its relationship with the modern nation state is a theme examined in chapter two. The chapter confirmed various themes of human

freedom, moral responsibility and ability to transcend as among the major themes in human history. The theme of freedom acquired poignancy in the contemporary times with the re–emergence and gradual unfolding of the secular phenomenon. The chapter noted that secularism as a worldview involved a super sensible world, humanity and nature in a manner that did not necessarily deny the super sensible world's existence, but simply marginalized it preferring to concentrate on this world. Instead of emphasizing the metaphysics of transcendence, where explanations come from beyond, secularism operates on metaphysics of immanence, where answers are to be found from within. Whether the secular state concept is compatible with Islam or not, is another issue examined in this chapter, and that continues to engage Islamic scholarship. Proponents of the compatibility position have argued that secularization is not the transformation of Muslims into secularists; it is the temporizing of values that are worldly, and freeing the *umma* (Muslim community) from the tendency to spiritualize such values. The opponents of compatibility thesis, while applying a civilizational approach, maintain that secularism as advanced by the west sacrifices the unitary character of Islam to a dualist point of view. Consequently, the question whether "God and Caesar" are one or separate, in Islam remains problematic in principle, but a practical reality among the contemporary Muslim societies.

Chapter two also examines the state secularism models as advanced by Ahmet Kuru distinguishing between passive and assertive secularism, symbolizing toleration or objection to public visibility of religion in state respectively. It is clear in this chapter that compatibility of Islam or any other religion with assertive secularism is negated; a reflection seen in the popular negativism toward secularism in many Muslim countries.

Muslim populations, however, may be persuaded to rethink secularism if they recognize an alternative model of passive secularism referred by Fethullah Gülen as the third way. This approach to religion in the public sphere enables the faithful from all religious backgrounds to legitimately have demands based on religion in the public sphere, and leave it to legislators to translate these demands into a secular language in the legislative process.

It is however clear in chapter two that the separation of religion and state as a constitutional policy is one of the confusing remnants of colonialism in Africa, when an Western institution is denoted with a typical African conception under the assumption that the western subject concerned corresponds with the African concept. A number of writers on Africa have expressed skepticism about this conventional wholesome lumping of African nations together with the rest of the world on the modern secular state issue, with regard to mediating the public presence of religion in state. A critical examination of state secularism in Africa confirmed that in general, African nations lacked appropriate critical ideological junctures in their histories to shape public visibility of religion in state policies.

Chapter three, while acknowledging that the concept of leadership is misunderstood, attempts to analyze the structure of leadership in Islam. It is clear, that Muslims recognize Allah as the Sovereign in moral, social, cultural, economic and political spheres of life. Arguably, in relation to leadership structure in Islam, Allah leads the world through the Quran. The Quran, however, is basically not a comprehensive legal code, because only about eighty verses strictly deal with legal matters. During Prophet Muhammad's lifetime, he interpreted and expanded the general provisions of the Quran.

After his demise, the same situational interpretation and expansion of Quranic message was carried out by his successors who served both as temporal and spiritual leaders. Muslim jurists have continued to broaden the scope shariah in the contemporary situation. Application of shariah and Islamic jurisprudence in selected contemporary countries in Africa is an issue dealt with in this chapter. It is clear that Islamic law can be spoken of in the limited sense of a body of rules with strict legal normative value, and whose compliance with is enforced by an Islamic authority called *Kadhi* court presided over by a person known as *al-Kadhi.* A wider view of shariah as enshrined in the Quran and the *sunnah* of the Prophet conceives shariah to have far more provisions and prescriptions demanding believers to operate a society that is fair to all its citizens, and which has constant checks and balances.

There is a basic dilemma with regard to shariah operations in the modern nation states as they are characterized by diversities, and changed circumstances. This dilemma has rendered the prevalent traditional interpretation of shariah profoundly problematic for constitutional governance, political stability, and economic development. Furthermore, globalization of the contemporary world has compounded the traditional interpretation of shariah through the ever increasing prevalent interpretations, falling under the general rubric of human rights. These rights have had serious implication for shariah as public policy, and positive law. Today, most Muslim countries, as the cases of Egypt, Libya and Nigeria testify, face major contemporary challenge as they engage modernity in the absence of an agreed upon contemporary formula for state religion engagement (An Naim 1990, 86). Consequently, most contemporary Muslim governments had tackled the ardors task of nation building by establishing states with more secular orientation and

circumscribed role of religion in public life. In particular, the cases of contemporary Egyptian and Libyan governments though with Muslim majority populations, exhibited trends that restrict Islam, and by consequence the application of Shariah to personal matters, with the exception of those instances when a regime finds it useful to appeal to other aspects of Islamic law. Shariah in these countries is diffused and operate under the uniform laws of the state that occasionally undergo reform to maintain relevance with changed contemporary circumstances. This position resonates with An Naim's advocacy for a shift in emphasis to the wider perspective of personal conscience, and non-literal understanding of the operations of shariah in the public domain. This equally gets support from the argument that wherever and whenever Muslims constituted the majority, or even a significant minority of the population, shariah principles would always influence and permeate the law and policy of the state at public level making them religious and secular simultaneously. This also echoes Fethullah Gülen's "third way" between the two extremes of passive and assertive secularity on state-religion-society relations. Gülen's third way endeavors to show an interpretation of Muslim secularism that inhabits religious and secular worlds simultaneously, and that critically engages each other blurring conventional political lines on the hotly debated issue of state secularism.

A reading of the contemporary Egyptian political history from this chapter informed this study that the demand for shariah as positive law, often by the Muslim Brotherhood, comes out forcefully as a fall-back system during the crisis moments of an otherwise secular system of political governance. This is because Muslim Brotherhood hold the traditional position that the state under shariah must apply it totally as a legal system that implies authority to enforce all aspect of shariah as positive law in the

nation's legal system. This also reflects extreme forms of conservative public visibility of religion in the state.

Nigeria, unlike Egypt and Libya, is a Muslim plural country with a federal arrangement as the basis of the nation. The federal nationalism was built on the understanding that in coming together to form a united Nigeria, the country had chosen to organize the various diverse peoples making up the country within a framework of single state without interfering with the popular ways of each. Consequently, shariah courts applying Islamic laws as positive public law had been instituted in most of the dominantly Muslim, and even in some cases, the Muslim plural states. The recent political situation in Nigeria, especially since the re-introduction of long dormant aspects of shariah as positive law, presented a high degree of misunderstanding and suspicion regarding shariah as could be seen in the attraction of negative international attention, and activities from Islamists. Sometimes this had resulted into confrontations that had led to ugly incidences culminating to loss of life.

The misunderstanding surrounding the application of Islamic shariah in Nigeria was not limited to Nigeria; the same had had a spillover effect by influencing shariah debates elsewhere in Africa. For example, during the constitutional debates involving the *Kadhi* court in Kenya, a section of the Christian church maintained that the demand for *Kadhi* court entrenchment in the 2010 Constitution of Kenya was more a Muslim ploy to turn Kenya into an Islamic state as was viewed to be the attempt in Nigeria under the Abuja Declaration.

With regard to shariah operations in contemporary Muslim states, the cases of Egypt, Libya, and Nigeria, confirm that in Muslim majority countries, the

demand for the operations of shariah as positive law in public is often a position favored by the Muslim Brotherhood, while in Muslim plural, or minority countries, the demand for shariah takes form of positive laws under institution of the *Kadhi* court.

Constitution has become an essential tool in the management of ethnic diversities in the modern world that has witnessed the breakdown of the traditional community with its emphasis on kinship ties. Chapter four examines employment of this tool in the specific context of Kenya for the national integration of Muslims as an ethnic group. The chapter acknowledges the fact that Kenya like many modern nation states, had grappled with the building of national loyalty on top of the ethnic loyalty. There is no doubt that ethnic mobilization had emerged as one of the aspects that defined the fundamental concepts on which the modern nation state was built. Ethnicity in the context of Kenya was more visible as it functioned along tribal lines where it provided a sense of belonging attached to a common tribal root. Even though ethnicity in general terms was often employed in terms of tribal relations without any further qualification, this chapter submitted that ethnicity was a multi-dimensional phenomenon that could also be construed in terms of religious grouping, apart from tribal community. It was therefore possible to talk of religious ethnicity among others.

The endeavor of nation building required the creation of a national system where all ethnic groups (both religious and tribal) felt that there was room for self-expression, and nurturing of self-identity. Analysis of the integration of Muslims as a religious ethnic group in Kenya during the colonial era indicated that colonialism generally disrupted, demoralized, and caused discontent among the Muslims at the East African coast. There was evidence however, that the Independence Constitution of Kenya viewed in the

context of national integration, had contributed significantly, as there was evidence of collective feeling of, and identity as primarily Kenyans. It was noted in support that, the Independence Constitution provided for *Kadhi* court for the application of Islamic law on matters of personal status, marriage, divorce and inheritance, in proceedings in which all the parties professed the Muslim religion.

The same Independence Constitution had ironically failed to secure for Muslims as an integral ethnic group in Kenya as it proved not to be a panacea of ethnic divisions as it should have been. The presidency was accused of responsibility in this regard through amassing of enormous power as to be able to trump over other organs of state such as the judiciary and legislature, and introducing constitutional amendments that did not effectively uphold constitutionalism. Consequently, ethnicity had confounded Kenya's governance structures and is one of the top challenges of state, more obviously in the tribal rather than religious forms. Even though religious ethnicity was less obvious in the Kenyan state management, its evidence was nonetheless glaring in the case of Muslims. To a considerable degree, the demand for, and the ensuing debates on the entrenchment of *Kadhi* court provision during the constitutional review moment in Kenya could be seen in this light of ethnic mobilization.

In an examination of the nature and operations of shariah in general, and its application as positive law in the *kadhi* court in the judicial system of Kenya in particular, the chapter pays special attention to the Kenya government policies whose deep historical roots in British colonial attitudes had presented real danger to all traditional legal systems that included the shariah. The chapter further noted that neither had the contemporary advocacy for human rights augured well for the application of certain aspects of the

shariah. It is in this regard that the chapter eventually examined the nature of shariah as legal statutes in contemporary Kenya, and how the same had been eroded continuously, and steadily. The relationship between the shariah and human rights in Kenya's Constitution examined in this chapter could be described as separationist, because the Islamic law and the human rights statutes occupy separate realms of the divine and the secular respectively. This secular perspective perceives human rights as a secular concept based on humanistic ideology, with emphasis to confer upon people, a kind of absolute autonomy, freedom, and liberty in whatever they choose.

Even though both international law and the 2010 Constitution of Kenya provide for the entitlements for freedom of religion, it was not very difficult to see why the application of shariah as statute laws in Kenya has received more limitations. This trend of narrowing jurisdiction of the public role of the shariah as positive law in Kenya also disapproved the position held by a section of the Church that opposed the entrenchment of *Kadhi* court in the 2010 constitution of Kenya. This group feared that the entrenchment could slowly turn Kenya into an Islamic state. To the contrary, even the entrenchment of *Kadhi* court in the country's Constitution has not reversed the fate of shariah as public statutory laws as its sphere of influence in the Kenyan legal system continue to dwindle. This position agreed with An Naim's thesis that the shariah as positive law, and public policy did not portend any future in a practical sense in the contemporary world. Yet, statistics indicate an increasing need for the *Kadhi* court's judicial remedies. There is also strong indication of dramatic increase and reversal of women's roles in the *Kadhi* court where they have increasingly predominated as plaintiffs.

Chapter five examined the ensuing debate following the entrenchment of the *Kadhi* court in the 2010 Constitution of Kenya draft. The debate pitted a section of Church leaders opposing the entrenchment, and Kenyan Muslims supporting the inclusion of the *Kadhi* court. The opposition by the section of the Church mainly cited the separation of state and religion, but sometimes went further to attribute a hidden Islamic agenda. As a result of the contemporary global nature of the world, this national debate in Kenya assumed a miniature global conflict pitting Muslims against Christian majority.

Whether Kenya was assertively, or passively secular, is an issue that came up in this chapter. It is clear that while the Kenyan Muslims adopted a passively secular perspective, the section of the Church embraced an assertively secular perspective as its major basis of argument. It is clear that the 2010 Constitution of Kenya has enough features in it that weighed the Kenyan state toward passive secularism, where public visibility of religion should be tolerated.

6.1 Contributions

This study has examined the concept of secular state in the context of Kenya, based on the raging debate about the entrenchment of *Kadhi* court in the 2010 Constitution of Kenya to highlight difficulties, challenges and opportunities posed by desacralizing the state. To that extent, themes of secularism, nation state, leadership in Islam, nationalism and human rights discourses were examined and their operations in the new modern nation states discussed.

It was clear that although a state could claim to be secular, it is difficult for the state and the tools of control to fully exclude religion. The literal employment of the

separation of religion and state, as the premise to retrench the *Kadhi* court from the 2010 Constitution of Kenya, failed to take into consideration some peculiar aspects of Kenyan nation on the issue of state secularity. For example, there was no point in time in the history of the Kenyan nation when the *Kadhi* courts and the state actors were engaged in conflicts that could qualify as ideological juncture to justify the state hostility towards public visibility of *Kadhi* courts as is often the case with assertive secularism. This position that rejects public visibility of religion in state as was expressed in the campaigns to retrench *Kadhi* court by a section of the Church, easily reflected assertive secularism. On the other hand, the Muslims who were well aware of the official Republic status of Kenya, as separating religion from state, did not however perceive any problem with the *Kadhi* court as part of the Republic, hence, presenting a contradiction. It was the position of this study that the apparent contradiction exhibited by the Muslims in this regard was a reflection about Africa in general, and Kenya in particular, on the concept of secular state as a state that did not necessarily ignore religion totally. This position by the Kenyan Muslims supports the passive rather than assertive thesis of state secularism.

A closely related issue that emerged in the study was that the debate and eventual entrenchment of the *Kadhi* court presented a challenge by the religious minority on the fallacy of uniform practical application of the secular state concept in Kenya. Analysis of the integration of Muslims as a religious ethnic group in Kenya during the colonial era indicated that colonialism generally disrupted, demoralized, and caused discontent among the Muslims at the East African coast including Kenya. The study while acknowledging the Western roots of modern constitutionalism including the Kenyan Constitution conceded that, Muslims, as a religious minority in Kenya, had a legitimate claim to have

concessions made on their behalf on the secular Constitution, even where these claims were religious in their public import.

It also emerged that it was difficult to apply shariah rigidly as positive law in a secular state without watering it down. As positive law to be enacted and enforced by the state, shariah faced steady diminution both in jurisdiction and status in Kenya due to the basic dilemma of diversity and modernity. This dilemma had been compounded by both internal and external factors. Internally, the nature of shariah as was obvious in its wider, and more inclusive perspective, precluded its enforcement by the state as positive law and public policy because the religious commitment of Muslims made the relegation of the shariah to the so called private domain neither viable nor desirable.As the case studies of Egypt, Libya, and Nigeria indicated, even though applying shariah as positive law had proved challenging, it was equally true that it was impossible for Muslims to apply any law without shariah permeating it.

New developments, however, had eaten into the realm of shariah as applied positively as law in the contemporary societies that included Kenya. More specifically the international human rights' dictates of equality, non-discrimination, freedoms and liberties, had the potential to restrict the realm of operations of shariah as positive law, in the 2010 Constitution of Kenya. It was ironic that the right to freedom of religious expression was both a promoter and a curtailer of religious practice, more so in the context of Islamic law application.

More significantly, the study examined the implication of the entrenchment of the *Kadhi* court in the secular constitution of Kenya. The entrenchment of the *Kadhi* court in the 2010 Constitution of Kenya had secular implications both for the Constitution and the

Kadhi court. To a considerable extent, the presence of *Kadhi* court in the Kenyan constitution implied that this institution lost its religious relevance as considerable reference shifted from the transcendence beyond to the immanent that was the state. This was partly the case when the Muslims in Kenya looked to the state to provide uniform procedure to be employed in the *Kadhi* court. More vulnerable in particular to the shift in focus from the beyond to the state were those faithful who did not comprehend the religious significance of the *Kadhi* institution well enough to relate them beyond the state, and to ultimately connect them to Allah. In the final analysis, therefore, whether *Kadhi* court shifted in focus towards the secular or not, as a result of their entrenchment into a secular state Constitution of Kenya, became a matter of approach, varying with the level of individual Muslim's spiritual perception. Meanwhile, considering that secular state in the context of Kenya did not necessarily exclude religion, the entrenchment of the *Kadhi* court in the 2010 Constitution, therefore, did not make Kenya a sacred state.

These contributions initially raised two questions:

(a) What was the understanding of the secular state concept in the specific context of the Kenyan nation?

(b) Did the opposition to the entrenchment of the *Kadhi* court in the 2010 Constitution of Kenya on the grounds that Kenya was a secular state, reflect the Kenyan nation?

In response to these questions, the study findings are as follows. First, in the Kenyan case, the understanding of secular state phenomenon does not necessarily exclude religion assertively, but as an-Naim's thesis suggests, constitutes a rather

complex mediation between religion and the state in a way that resonates with passive secularism in the "third way" model of Fethullah Gülen, when the *Kadhi* court in the 2010 Constitution of Kenya, for example, has its referent point as both the state and the beyond. The study further finds that the entrenchment of the *Kadhi* court in the 2010 Constitution of Kenya much as it introduced religious import in the Constitution, left the secular premise intact.

6.2 Recommendation

This study has demonstrated that the literal application of the separation of religion and state as proclaimed by the 2010 Constitution of Kenya failed to provide due accommodation to the uniquely distinctive character of religious minorities within the state. The literal distinction between the religious and the secular as was the interpretation by a section of the Church leaders was misleading, since religious precepts necessarily responded to the secular concerns and are only relevant through their acceptance and application by the believers. Separation of religion and state should be understood to have a practical consequence of mediating between religion and state. Put in another way, religious doctrines are necessarily implicated in the secular, and the secular is perceived by the believers to be regulated by the religious doctrine as the preamble to the 2010 Constitution of Kenya and the national anthem demonstrate. The preamble to the 2010 Constitution of Kenya expresses the connection between the sacred and the religious; "We the people of Kenya- ACKNOWLEDGING the supremacy of the almighty God of all creation,"

Though the 2010 Constitution of Kenya went through a Referendum against opposition from a section of the Church leadership, a majority of Kenyans passed the

constitution hoping to amend the section on contentious issues. The study acknowledges Muslims in Kenya as a minority, and that any blanket application of democracy as the premise on separation of religion and state in Kenya presented, could be interpreted as unfair treatment. Instead, the separation of religion and state, as a nation building strategy, should be employed to persuade populations to accept the homogeneous identity of the bureaucratic nation state, while at the same time, protecting mutually hostile groups or individuals against one another. Consequently, I strongly maintain in this study that the separation of religion and state in the context of Kenya should have a practical implication of moving the diverse religious groups to reach their full potential within the co-existence that restores the principle of mutual justifiability.

6.3 Area for Further Research

This study has raised the issue of Muslim women representation in the *Kadhi* court. The degree to which gender concerns on equality influenced the views of Muslim with regard to the entrenchment of *Kadhi* court in the 2010 Constitution of Kenya was not within the immediate scope of this study. It is my hope that researchers with interest in Islam, gender and the Constitution in Kenya will pursue this area further.

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APPENDIX A

A Letter of Introduction

Dear sir/madam

I am carrying out a study on the debates surrounding the entrenchment of *Kadhi* court in the constitution of Kenya. I kindly request you to answer the questions below.

All responses will be handled confidentially and purely for the purpose of this study.

Thank You

Yours sincerely,

OCHIENG AHAYA

Department of Philosophy, Religion and Theology,

School of Arts and Social Sciences (SASS)

Moi University.

APPENDIX B

INTERVIEW SCHEDULE TO NATIONAL OFFICIALS OF SUPKEM/CIPK/NAMLEF

Part A: Personal Information

i. What is SUPKEM/CIPK/NAMLEF?

ii. What are your responsibilities in SUPKEM/CIPK/NAMLEF?

Part B: The Institution of the Kadhi

i. What is the importance of the *Kadhi* court in the life of a Muslim?

ii. How would you describe the provision of *Kadhi* court in the constitution?

iii. Would you consider it possible to observe the provisions of the Islamic Family Law without necessarily resorting to the *Kadhi* courts?

iv. What were the Muslims 'suggestions about *Kadhi* court during the constitutional review process in Kenya?

v. Would you consider a presence of gender dimension in the suggestions in (iV) above?

Part C: State Secularism

i. What is your understanding of State- Religion relations?

ii. What is your understanding of a secular state?

iii. Would you describe Kenya as a secular state?

iv. What is the significance of secular state phenomenon in the modern world?

Part D: The Debate

i. How would you justify the entrenchment of *Kadhi* court in the constitution, ?

ii. What are your comments on the opposition to the entrenchment of *Kadhi* Court in the constitution of Kenya?

iii. Any other comment.

APPENDIX C

A Letter of Introduction

Dear Sir/Madam,

I are carrying out a study on the debates surrounding the entrenchment of Kadhi Court in the constitution of Kenya. I kindly request you to answer the questions below.

All responses will be handled confidentially and purely for the purpose of this study.

Thank you,

Yours sincerely,

Ochieng Lukes Ahaya

Department of Philosophy Religion and Theology,

School of Arts and Social Sciences

Moi University.

APPENDIX D

QUESTIONNAIRE TO NATIONAL OFFICIALS OF CHURCHES

Part A: Personal Information

i. What Church organization are you representing?

ii. What is your position in the said organization?

iii. Describe your responsibilities in the said position.

Part B:The Kadhi Courts among Muslims

i.

ii. What is your understanding of *Kadhi* Court as an institution for Muslims?

iii Is *Kadhi* Court important in the life of a Muslims?

iii. How would you describe the provision of *Kadhi* Court in the constitution?

iv. Was there a difference between Kadhi Court as provided in the old Constitution and as was suggested by the Muslims during the constitutional review process in Kenya?

v. What is your view about the entrenchment of the *Kadhi* Court in the current constitutional?

Part C:State Secularism

i. What is the Christian view on State-Religion relations?

ii. What is the Islamic view about State-Religion relations?

iii. What is your understanding of a secular state?

iv. Would you describe Kenya as a secular state?

v. If so, give reasons for your answer.

vi. How did you help Muslims in Kenya to realize their demand of incorporating the *Kadhi* court in the constitution?

vii. Please give reasons for your response in (vi) above.

viii. What do you understand by freedom of religion?

APPENDIX E

Constitution of Kenya Review Commission (CKRC) Recommendations about Kadhi courts

1. The number of Kadhi's Courts be increased to not less than 30 to be located in the districts where Muslims predominantly reside. These Courts will be called the District *Kadhi'*s Court to be held? by a *Kadhi*. Appeals from this Court shall be heard by the Provincial *Kadhi'*s Court and will be presided over by a Senior *Kadhi*. The last Court in this hierarchy shall be the *Kadhi*'s Court of Appeal and the Chief *Kadhi* assisted by 2 Senior Kadhi's will preside over this Court which shall be the final Court of Appeal for the *Kadhi'*s Court's. The *Kadhis* Court of Appeal shall, in addition to its usual sitting, also sit at regular intervals throughout each calendar year in each of the regions of the country to hear appeals in those regions. An appeal from the *Kadhi'*s Court of Appeal shall lie to the Supreme Court only on a point of Islamic Law or an issue affecting the interpretation of this constitution as it relates to the *Kadhi*'s Court's provided always that the Court shall apply Islamic Law in determining the appeal.

2. The jurisdiction of the *Kadhi'*s Courts shall be increased to deal with not only Muslim personal law but also to Civil and Commercial matters where both Parties before the Court profess the Muslim faith. This enhanced jurisdiction of the *Kadhi*'s Courts will be subject and without prejudice to the right of any Muslim to go to any Court other than the *Kadhi*'s Court to deal with such Civil or Commercial matter as the person so desires.

3. The Chief *Kadhi* shall have the same status, priviledges and immunities as a High Court Judge, the Senior *Kadhi* as a Chief Magistrate and the *Kadhi* as a Resident Magistrate.

Muslim Lawyers who are experts in Islamic Law be appointed as Judges of the High Court to hear appeals from the *Kadhi*'s Court of Appeal.Muslims in Kenya must be consulted in the nomination and appointment of the Chief *Kadhi* and the *Kadhi*'s either through their participation in the process through an election or by their duly appointed representatives.

4(a) The qualification for appointment to the position of Chief *Kadhi* shall be that one must be a Muslim; aged 35 years and above but below 65 years.

(ii) Is an Advocate of the High Court of Kenya or is qualified to be appointed as such and has been a legal practitioner for a period of not less than 10 years; and

(iii) Has obtained at least a degree in Islamic Law from a recognized University; or

Has not less than 10 years experience in the practice of Islamic Law, has held the office of a *Kadhi'*s Court for a similar period and has at least a degree in Islamic law from a recognised university.

5. The qualification for appointment as a *Kadhi* and a Senior *Kadhi* shall be as in (a) above with the exception that the years of experience shall be 5 years under each of the categories of qualifications.

6. The composition of the Judicial Service Commission shall be expanded to include the Chief *Kadhi* and one other person nominated by National Muslim organizations who must be a Muslim woman.

7. The Chief *Kadhi* (and not the Chief Justice) shall be mandated to make the Islamic rules of Court, of practice, procedure and evidence to be applied in the *Kadhi*'s Courts in consultation with the Chief Justice, the Law Society of Kenya.

8. The *Kadhi*'s Courts shall, in addition to their exclusive jurisdiction to deal with the substantive Muslim personal law on inheritance and succession, also have the power to determine the procedure to be applied in the administration of the estates of deceased Muslims.

9. The *Kadhis* Courts be expressly mandated to deal with not only divorce in Islamic marriages but also with the consequential matters that arise out of such divorce and other matters incidental thereto or connected therewith such as custody and maintenance of children, guardianship, adoption of children and division of matrimonial properties.

10. The jurisdiction of the *Kadhis* court be expanded also to include the administration of *Wakf* properties as are currently administered by the Commission appointed under the *Wakf* Commissioners Act. Appropriate amendments be made to the said Act to firstly expand its application and operation throughout Kenya and secondly to vest in the relevant *Kadhis* courts all the powers and functions as are now exercised by the *Wakf* Commission.

11. The work of the Chief *Kadhi* and the other *Kadhis* shall be strictly judicial work in accordance with the Provisions of the constitution or any other written Law defining their Jurisdiction.

12. That Islamic Law on marriage, divorce, inheritance and succession shall be codified so that appropriate legislation is enacted dealing with the substantive law of Islam on marriage, divorce and inheritance. The goal will be to achieve an Act or Acts of Parliament dealing with the Islamic Law of marriage, divorce and succession.

13. There should be a female assistant to the *Kadhi*'s Court to assist in dealing with the more delicate and intimate issues affecting women litigants in the Court. The female

assistants should have basic knowledge of Islamic Law where possible. Their role would basically be equivalent to administrative officers in the courts and not as judicial officers. They would not deputize for or act in the place of the *Kadhis*.

14. In the appointment of the *Kadhis*, consideration shall be given to the appointment of Muslims of the *Shia* Sect to cater for the needs of the *Shia* Muslims in Kenya.

15. References to Mohammedan Law in the constitution and in all other written Laws should be changed to Islamic Law.

16. Islamic Law studies should be included in the Curriculum or course studies for Law graduates in Kenya.

17. An office of an Islamic mufti or spiritual leader be established in Kenya with functions and duties defined by law. The mufti must be elected by all Kenyan Muslims. The qualification for appointment or election as a *mufti* be equivalent to those of the chief *Kadhi* or a demonstrated competence as a distinguished scholar in IslamicLaw.[12]

APPENDIX F

Introduction and Conclusion to the Judgment to the Civil Application case 890 of 2004 on the

Constitutionality of the Entrenchment of Kadhi Court in the Constitution.

Introduction

...**(1)** **<u>The Application and Parties:</u>** This Judgement relates to the Further Originating Summons, first dated 12th July, 2004, Amended on 30th November 2004, *(pursuant to the Order of Court made on 16th November 2004),* and Further Amended on 1st February 2005 *(pursuant to leave of Court given on 31st January 2005).* It is brought by the twenty-six Applicants led by the **Very Right Rev. Dr. Jesse Kamau** the Moderator of the Presbyterian Church of East Africa, **Bishop Silas Yego** of the Inland Church of Africa, **Bishop Margaret Wanjiru** of Jesus Christ AliveMinistries,the **Rt. Rev. Dr. David Githii**, **Bishop Arthur Gitonga, Bishop Boniface Adoyo** of Nairobi Pentecostal Church and the Reverends as enlisted above against the Attorney-General as 1st Respondent and the defunct Constitution of Kenya Review Commission as 2nd Respondent.

...(2) **<u>The Applicants Seek the Following Declarations</u>:**

(1) that Section 66 of the Constitution of Kenya which introduces and entrenches Kadhis' Courts in the said Constitution infringes on the Constitutional rights of the Applicants to equal protection of the law

embodied in Sections, 70, 78, 79, 80 and 82 of the Constitution and to that extent is discriminatory, unconstitutional and should be expunged in its entirety from the said Constitution;

(2) that Section 66 of the Constitution of Kenya is inconsistent with Section 82 of the same Constitution and is therefore null and void;

(3) that any provision similar to section 66 of the Constitution of Kenya in word or effect as proposed in the draft otherwise known as the **"Zero"** or **"Bomas Draft**" or any other draft infringes the right of the Applicants and is discriminatory, is unconstitutional, null and void and of no effect;

(4) that the enactment of the Kadhis' Courts Act contravenes the Constitution and is to that extent null and void;

(5) that the financial maintenance and support of the Kadhis' Courts from public coffers amounts to segregation, is sectarian, discriminative, unjust as against the applicants and others and amounts to separate development of one religion and religious practice and therefore unconstitution

(6) that further and in the alternative and without prejudice to the foregoing, the purported extension of the jurisdiction of the Kadhis' Courts through the enactment of the Kadhis' Courts Act from the former Protectorate to areas falling outside the said Protectorate contravenes the Constitution and is null and void;

(7) that any or all provision(s) such as Section 66 of the Constitution and Section 197 (2) 198, 200 (1) (e) of the "Zero" draft that seeks(s) to introduce and/or entrench, promote, elevate, encourage, advance, give special preference to, support by public funds or otherwise any religion or sectarian religious

interests or such interests of a religious nature or otherwise that draw their base from a given or known set of religious teachings/doctrines, practices and/or beliefs in the Constitution is and would be discriminatory, oppressive to the applicants and others, offensive to the doctrine of separation of state and religion retrogressive, unconstitutional null and void;

(8) that any form of religious courts should not form part of the Judiciary in the Constitution of Kenya as it offends the doctrine of separation of state and religion and also Chapter 2 S. 9 of the "**Zero**" or "**Bomas Draft**";

(9) that the entrenchment of the Kadhis' Courts under the aforesaid section 66 of the Constitution of Kenya and in the draft otherwise known as the "**Zero**" or "**BomasDraft"** section 197 (2), 198, 199, 200(1) (e) has a clear and determined hidden agenda to or is intended to advance, promote, encourage, introduce, propagate an Islamic agenda or what is popularly or otherwise known as the Abuja Declaration for Africa and Kenya whose ultimate objective is to turn Africa in general into an Islamic continent and Kenya in particular into an Islamic nation and transgresses, dilutes, vitiates, infringes on the constitutional rights of the Applicants and discriminates against the Applicants and their right to equal protection of law as stated above;

(10) the Applicants pray that without prejudice to the foregoing and in the alternative a declaration be and is hereby issued that such entrenchment does reasonably evoke fears of schemes of subterfuge and constitutional sabotage in the Applicants the right to equal protection under the Constitution.

(11) that the entrenchment of the Kadhis' Courts in the Constitution was and is but the stepping stone and or vehicle to the attempt being made through the **"Zero"** and or **"Bomas Draft's** introducing of **"Sharia Law"** or form of justice in Kenya as has happened in other jurisdictions in Africa and which step is retrogressive, discriminatory, dangerous as far as the stability of the Nation is concerned, unjust, detrimental to the Applicants and all Kenyans and is unconstitutional;

(12) further and in the alternative it be and is hereby declared that the entrenchment of the Kadhis' Courts in the Constitution, the introduction of Sharia and or Islamic agenda for Kenya and Africa and the whole of the Islamic religious agenda is aimed ultimately at the sole goal of acquiring **inter alia** political power, supremacy and control over Africa and Kenya in particular by means which are unconstitutional, discriminative and oppressive to the Applicants and other Kenyans;

(13) that the entrenchment of the Kadhis' Court in the Constitution elevates and uplifts the Islamic religion over and above other religions in Kenya which is unconstitutional and discriminatory against the Applicants and Kenyans of other religion

(14) that the process leading to the inclusion of the Kadhis' Courts in the so called **"Zero**" or "**Bomas draft**" a new Constitution under the Constitution Kenya Review Act Cap 3A was flawed, lopsided, fraught with partisan entrenched and sectarian interests biased, corrupt and manifestly inimical to constitutionalism

and discriminated against the applicants, their religion and other religions in Kenya; and

(15) that an order be issued in the first instance to restrain the respondents jointly and severally or any one of them or any other person or group of persons claiming under them jointly and or severally from discussing, subjecting to debate in any form and in any manner whatsoever the draft Constitution prepared by the National Constitutional Conference otherwise known as the **"Zero Draft**" or "**Bomas Draft"** or by whatever name called pending the hearing and determination of this application.

Conclusions

1. In view of the discussion above, we grant the declarations sought in prayer 1 limited to declaring that section 66 is inconsistent with sections 65 and 82 and in respect of section 82 is discriminatory to the Applicants in its effect.

2. As regards paragraph 2 of the prayers we find and hold that sections 66 and 82 are inconsistent with each other, and that section 66 is superfluous but it is not the court's role to expunge it. It is the role of Parliament and the citizenry in a referendum.

3. As regards prayer 3, we hold and declare that any provision similar to section 66 in any other Draft of a Constitution in word or effect is not ripe for determination

4. The enactment and the application of the Kadhis' courts to areas beyond the 10 mile Coastal strip of the Protectorate is unconstitutional.

5. We grant prayer 5 that the financial maintenance and support of the Kadhis' courts from public coffers amounts to segregation, is sectarian discriminatory and unjust as against the Applicants and others and amounts to separate development of one religion

and religious practice contrary to the principle of separation of state and religion (secularism) and is therefore contrary to the universal norms and principles of liberty and freedom of religion envisaged under sections 70, 78 and 82 of the Constitution and also against the principle of separation of state and religion as captioned by section 1A of the Constitution.

6. We also find and hold that the purported extension of the Kadhis' courts through the enactment of the Kadhis' Courts Act beyond the former Protectorate areas contravenes section 64(4) and section 4(2) (b) of the Kadhis' Courts Act and is therefore unconstitutional, null and void to the extent of the inconsistency and for that reason a declaration in terms of prayer 6 is granted.

7. We grant the declaration in prayer 7 in relation to section 66 of the Constitution.

8. We grant a declaration that any form of religious courts should not form part of the Judiciary in the Constitution as it offends the doctrine of separation of state and religion.

9. We grant prayer 13 and declare that the entrenchment of the Kadhi's courts in the Constitution elevates and uplifts the Islamic religion over and above the other religions in Kenya which is inconsistent with section 78 and 82 of the Constitution and discriminatory in its effect against the applicants and Kenyans of other religions.

10. We further find and hold that prayers 9, 10, 11, 12, 14 & 15 relating respectively to the **Bomas Zero** Draft and an Islamic Agenda are matters which are **moot and speculative** and are not justiciable and decline to grant them.

For avoidance of doubt this decision has been handed down on the basis that the role of the court is to interpret and declare the law and that the doctrine of separation of

powers quite rightly prevents us from amending the law (which role rests with Parliament) or the enactment of a new constitution including its contents which role is vested in the people of Kenya**.**

COSTS

This is public interest litigation. There are no losers or winners. We make no order as to costs.

Dated, delivered and signed at Nairobi this 24th day of May 2010

J. G. NYAMU

JUDGE OF APPEAL

(Signed under section 64(4) of the Constitution)

R. V. P. WENDO

JUDGE

M. J. ANYARA EMUKULE

JUDGE